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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of PETER THOMPSON, Bankrupt. R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt, *Appellant,* —vs.— L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a Corporation, *Appellee.*	No. 3433

Appellant's Brief

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THE BELL PRESS, TACOMA, WASH.

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Appellant's Brief

L. H. Macomber as receiver of the Peter Thompson Company, a corporation, is seeking to have allowed a claim of approximately $8,500.00 against the estate of Peter Thompson, an individual, growing out of an alleged liability on the Peter Thompson stock subscription. The claim has been allowed by the District Judge (pp. 41-43).

The trustee has both appealed and filed a Petition for Revision under section 24-b of the Bankruptcy Act of 1898. Nothing was considered by the District Judge other than questions of law, and we are of the opinion, therefore, that the proper course to pursue in presenting this matter to the appellate court is by a Petition for Revision. As we understand the rule, if there are disputed questions of fact the remedy is by appeal, but if questions of law alone are involved the remedy is by Petition for Revision. If, perchance, this Court should be of the opinion that the proper method of presenting the matter is by an appeal, we respectfully request that the Petition for Revision be dismissed, but that our brief filed in connection with the Petition for Revision be considered as our brief on appeal; if, on the other hand, the Court is of the opinion that our theory is correct, namely, that this matter may be reviewed on a Petition for Revision, we respectfully ask that the appeal be dismissed.

The trustee interposed six Objections to the claim of the said Macomber (pp. 27-32). All of the Objections were, on motion of the receiver's attorney (pp. 33-34), stricken by order of the District Judge.

The Referee's Certificate on Review (pp. 66-71) recites that these creditors now represented by the receiver are the same crditors who filed their claims each individually for the same debt and which were disallowed, and apparently the Honorable Referee was discussing facts brought out in previous hear-

ings before him, and of which he took judicial knowledge. However, none of these facts were considered by the District Judge, as is shown by the record, the latter at all times having viewed the Objections as a matter of law.

It is the purpose of the trustee that the decisions of the District Judge shall be reviewed by this Court, and we again respectfully request that the Court will allow us to be heard either on the Appeal or on the Petition for Revision.

W. W. KEYES,
Attorney for Appellant.

No. 3433

United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of PETER THOMPSON, Bankrupt.
R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt,

Appellant,

vs.

L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLEE

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Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLEE

ARGUMENT

I.

On the Motion to Dismiss the Petition to Review Under Section 24 (b) of the Bankruptcy Act.

The appellee has heretofore moved to dismiss the petition for review on the ground that this Court has no jurisdiction to entertain the petition, and

because the proper remedy of the petitioner for a consideration of the matter in controversy, in this Court, is by appeal, and not by petition to revise.

Sec. 25 (a) of the Bankruptcy Act provides:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings f r o m the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to-wit * * * and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

The controversy brought to this Court for decision is one pending between the trustee and a creditor, over the allowance of a general, unsecured claim of over five hundred dollars. Appeal under Section 25 (a) is the method, and the exclusive method, for reviewing proceedings of this character in the Circuit Court of Appeals, and this is so, whether the facts be disputed or found.

Opposing counsel, on page 2 of his brief on appeal, which entire brief comprises three pages, says:

> "The trustee has both appealed and filed a Petition for Revision under section 24-b of the Bankruptcy Act of 1898. Nothing was considered by the District Judge other than ques-

> tions of law, and we are of the opinion, therefore, that the proper course to pursue in presenting this matter to the appellate court is by a Petition for Revision. As we understand the rule, if there are disputed questions of fact the remedy is by appeal, but if questions of law alone are involved the remedy is by Petition for Revision."

Opposing counsel is entirely wrong in his contention that because there are no disputed questions of fact under consideration and because questions of law alone are involved his remedy is by petition for revision.

A petition to revise, under Sec. 24-b will not lie under any circumstances for the purpose of obtaining a review of a decision of the District Court relating to the allowance or rejection of a debt or claim of five hundred dollars or over. The method of review is only by appeal under Sec. 25-a. Under no circumstances is an additional remedy afforded under Sec. 24-b, even though merely questions of law are involved.

This very point was considered by this Court in *First National Bank v. State Bank*, 131 Fed. 430, 12 A. B. R. 440, 444, wherein this Court said:

> "But in these cases it was held that no such rehearing or review could be had where the appeal is taken under the provisions of section 25-a. A general consensus of opinion is that, section 25-a having provided a means

to review three kinds of judgments, every other means is excluded."

In re Loving, 224 U. S. 183, 27 A. B. R. 852, expressly holds that the proceeding under Sec. 24-b permitting a review of questions of law arising in bankruptcy proceedings was not intended as a substitute for the right of appeal under Sec. 25. Further authority will be found in Sec. 2880 of Remington on Bankruptcy (2d Ed.) and the numerous cases therein cited.

Extended allusion to the authorities is unnecessary, inasmuch as the question has been definitely settled by numerous decisions of this Court, as well as in other jurisdictions.

The last word of this Court on this subject is found in:

Matter of Russell, 247 Fed. 95; 41 A. B. R. 234.

Matter of Creech Bros. Lumber Co., 240 Fed. 8; 39 A. B. R., 487.

See also:

King Lumber Co. v. Nat. Exch. Bank (C. C. A. 4th Cir.) 253 Fed. 946; 42 A. B. R. 651.

Matter of Monarch Acetylene Co. (C. C. A. 2d Cir.) 245 Fed. 741; 39 A. B. R. 818.

American Piano Co. v. Heazel (C. C. A. 4th Cir.) 240 Fed. 410; 38 A. B. R. 677.

Collier on Bankruptcy, (11th Ed.) 578, 579, 586.

Remington on Bankruptcy, (2d Ed.) Sec. 2880.

II.

On the Motion to Dismiss the Appeal.

Appellee has heretofore moved to dismiss this appeal because this Court has no jurisdiction of the same, and because the appeal was not sued out within the time limited.

Appellant on page 2 of his brief concedes that the appeal should be dismissed, but puts it on the ground "that the proper course to pursue in presenting this matter to the appellate court is by a Petition for Revision."

We entirely agree with him that the appeal should be dismissed, but not on the ground stated by him, and anticipating that he may hereafter change his position and contend that after all his proper method of bringing this controversy to this court was by appeal, we must proceed to argue the negative of this proposition.

The appeal must be dismissed because it was not taken within ten days after the judgment appealed from had been rendered.

The original and final judgment allowing the claim in dispute was signed and filed September 30, 1919. (Record, pp. 71, 72.)

The time for appeal therefrom expired on October 10, 1919, the limitation contained in Sec. 25 (a) being both distinct and imperative.

The petition for appeal was not in fact filed until December 1, 1919,—some fifty days after the right of appeal had been lost. (Record, pp. 78, 79).

It is true that the District Court vacated the judgment of September 30th and entered a new (?) order reallowing the claim in dispute as of November 24, 1919, (Record, pp. 132, 133, 134) and that the petition for appeal was filed within ten days after the last mentioned date.

The sole reason for this extraordinary proceeding on the part of the court below is expressed in the order of November 24th itself, reading as follows: (Record, p. 133).

> "The Court further finds that an appeal had at all times been contemplated by the trustee, to the Circuit Court of Appeals, in the event of an adverse decision by this Court, and that the delay in taking such appeal within ten days after September 30, 1919, was not caused by the culpable neglect of the trustee or his counsel, and believing that the trustee should have the opportunity of appealing seasonably, and that it lies within the discretion of this Court to enter this order. Now, therefore, it is ordered, that the claim of L. H. Macomber, as receiver, be and the same is hereby allowed as and of the date of the entry hereof, and that said order of September 30th heretofore referred to, be and it is hereby set aside and annulled."

The act of the District Court in vacating the original order allowing the claim on September 30th, and entering a new order of identically the same

effect, on November 24th, simply to circumvent the statute and to extend or revive a lost right of appeal, was not an act which lay within the discretion of the court, despite its assertion to that effect. *The later order is a nullity because the court was without jurisdiction to enter it.*

An appeal is a matter of right, given by statute, and can neither be restricted or enlarged by the District Court or the Circuit Court of Appeals.

In *Youtsey v. Nismonger*, (C. C. A. 6th Cir.) 258 Fed. 16, 44 A. B. R. 109, the court remarked:

> "Whether or not they are entitled to make the motion is unimportant, for it would be our duty to dismiss the appeal on our own motion in case it did not lie or was not taken in time."

In the case at bar appellant had filed a petition for rehearsing on the merits combined with a petition to vacate the order of September 30th,—the latter on the ground that *legal* notice of the signing thereof had not been given him. (Record, pp. 73, 74, 75). Both applications were made more than ten days after the order had been entered, and were obviously a pretense, the real purpose being to revive the lost right of appeal.

The District Court in effect so found by its order of November 24th, (Record, pp. 132, 133, 134) for by that order the petition for a rehearsing was denied. The application to vacate the order for want of sufficient notice of the entry thereof was also denied on that ground, but granted, as expressly

recited in the order itself, for the purpose of reviving appellant's right of appeal which had been lost by delay "not caused by the culpable neglect of the trustee or his counsel."

The practice of reviving a lost right of appeal by a petition pretended to be for a reconsideration of the merits, or by the subsequent entering of an alias order, as was done in the case at bar, has been condemned as an abuse of discretion and ineffectual to extend the time limit, in the following cases:

West v. McLoughlin, (C. C. A. Mich.) 162 Fed. 124; 20 A. B. R. 654.

In re Wright, 96 Fed. 820; 3 A. B. R. 154.

In re Girard Glazed Kid Co., 169 Fed. 152; 12 A. B. R. 295.

A case analagous to the one at bar is In re Berkebile (C. C. A. N. Y.) 144 Fed. 577; 16 A. B. R. 277. In that case an adjudication of bankruptcy had been entered on February 28. The court in its opinion says:

> "Thereafter an additional adjudication to precisely the same effect was filed in the clerk's office on March 1st. It also provided "the said Eppie B. Berkebile is hereby declared and adjudged bankrupt accordingly."
>
> "No appeal was taken from the adjudication of February 28th, but on March 11th an appeal was taken from the adjudication of March 1st.
>
> "Adjudication of bankruptcy having been filed in the clerk's office on February 28th, it

could be reviewed only by an appeal filed within ten days thereafter. Bankr. Act July 1, 1898, C. 541 sec. 25, 30 Stat. 553 (U. S. Comp. St. 1901 p. 3432). That time could not be extended by the subsequent entry of an alias adjudication. Therefore upon this appeal, taken more than ten days after entry, the adjudication of February 28th could not be reviewed. If the alias adjudication of March 1st were considered and set aside upon this appeal, such disposition of it would in no way affect the adjudication of bankruptcy of February 28th, which by failure to appeal from it has now become final.

"Appeals will not be entertained to argue moot questions only, and therefore this appeal is dismissed."

To the same effect is the opinion by the same court in re Goldberg, 167 Fed. 808; 21 A. B. R. 828. The entire opinion reads as follows:

"This is a petition by the bankrupt to revise an order of the District Court, Southern District of New York. On March 6, 1907, petitioner was adjudicated a bankrupt. He did not appeal, and the time limited by the statute (Act July 1, 1898, c. 541, Sec. 25a (3), 30 Stat. 553, (U. S. Comp. St. 1901, p. 3432)) for taking an appeal expired March, 1907. A year later, March 23, 1908, he moved the District Court to vacate the order of adjudication;

> his application was denied. This is merely an attempt indirectly to extend the time within which to review the adjudication of bankruptcy. That cannot be done. Matter of Berkebile, 16 Am. B. R. 227, 144 Fed. 577, 75 C. C. A. 333. Ordered affirmed."

In *Brady v. Bernard & Kittinger* (C. C. A. 6th Cir.) 170 Fed. 576; 22 A. B. R. 342, the Court said:

> "As an appeal was prayed or granted from the judgment of adjudication within ten days after its rendition, the time for appeal therefrom expired at the end of said ten days, and could not be extended or revived by any subsequent proceedings in the case."

Even if it be conceded that the Court had the right to grant an application, either for rehearsing or to vacate the order preliminary to the entry of a new order from the date of which the time for appeal would begin to run, such application must be filed within ten days from the date of the original order, and this was not done in the instant case. The combined petition for rehearsing and application to vacate the order of September 30th was not filed until October 14th.

The decision of the Supreme Court of the United States in re *Conboy v. National Bank*, 203 U. S. 141, 16 A. B. R. 775, is pertinent on this point, as well as on the general proposition that the lower court could not nullify the time limit for appeal by the expedient of vacating the order of September

30th and re-entering the order allowing the claim as of November 24th. That case involved an appeal from the Circuit Court of Appeals to the Supreme Court. The only distinction in the procedure seems to be that the time limit is thirty days instead of ten days. Justice Fullerton delivered the opinion and said:

> "No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett v. Brockett*, 2 How. 238; *Wylie v. Coxe*, 14 How. 1. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not re-invest himself with that right by filing a petition for rehearing.
>
> "The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. 'When the time for taking an appeal has expired, it cannot be re-arrested or called back by a simple order of court. If it could be, the law which limits

the time within which an appeal can be taken would be a dead letter.' *Credit Company, Limited, v. Arkansas Central Railway Company,* 128 U. S. 258, 261."

Other late cases and authorities on the general propositions that the appeal must be taken as expressly provided by statute, within ten days after the judgment, that the time may not be extended, or the lost right revived by granting a petition for rehearing, or by any other subsequent proceeding in the case, will be found in the text, and the numerous annotations thereto, in the following works:

Collier on Bankruptcy (11th Ed.) 598.

Remington on Bankruptcy (2d Ed.) Sec. 2981, 2989, 2990.

See also the following late cases:

Matter of George Zeis (C. C. A. 2d. Cir.) 245 Fed. 737; 39 A. B. R. 380.

Matter of Monarch Acetylene Co. (C. C. A. 2d Cir.) 245 Fed. 741; 39 A. B. R. 818.

Finally, appellant will no doubt defend the action of the Court in vacating the order of September 30th on the ground that he did not receive such notice of the entry of the order as Equity Rule IV required, and hence was not bound by that date in figuring the time when the ten-day period for appeal began to run. That ground was the only one advanced by him in his application to vacate the order of September 30th, and constituted his sole excuse for not petitioning for an appeal within ten days

after that date. His statement on this point, as contained in his petition to vacate, reads as follows: (Record, pp. 74, 75)

> "That the trustee herein further petitions the court that the order heretofore made by this Court directing that the claim of the Receiver Macomber be allowed should be set aside and annulled for the reason that neither the trustee nor his attorney had been apprised of the entry of any such order (66) until a letter was received from the attorney for the receiver under date of October 13, 1919, in which he stated that such an order had been entered on the 30th day of September, 1919. That the Trustee's attorney, both in open court and to the receiver's attorney, stated that it was the desire of the creditors represented by the trustee that an appeal should be made from the decision of the District Court, and that the attorney for the trustee has been awaiting notifications of the entry of the order in accordance with the rules of practice of this court to which reference is made, namely: Rule IV which is as follows: 'Neither the noting of an order in the Equity Docket nor its entry on the order book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to and in the absence of a party the clerk unless otherwise directed by the Court or Judge shall

> forthwith send a copy thereof by mail to such party or his solicitor and a note of such mailing shall be made in the Equity Docket which shall be taken as sufficient proof of due notice of the order."

But neither in his petition nor in his affidavit in support thereof does appellant deny that he received notice of the presentation of the proposed order of Sptember 30th *before it was actually signed*, together with a copy of the proposed order. And the District Judge, in his order of November 24th setting aside the order of September 30th, expressly recites: (Record, p. 132)

> "On September 30, 1919, said W. W. Keyes received by mail from Leopold M. Stern of Seattle, a copy of said order, together with notice of its presentation to the Court for signature * * * *"

It may be admitted, as recited in the application to vacate the order that appellant had not received "actual" notice that the order of September 30th *had* been signed and filed, until October 13, 1919, on which date (Record, p. 133) "was *reminded* that said order had been signed and entered by this Court on September 30, 1919."

However, that point was not considered by the District Judge as ground for setting aside the order. In effect, the court below found that appellant had good and sufficient notice of the presentation of the order of September 30th, together with a copy

thereof, in time to be heard if the proposed order was not satisfactory; that he simply forgot about the matter until "reminded" thirteen days later that the order had "actually" been signed.

The District Judge, after affirming that the notification of the entry of the order had been given to the appellant, in accordance with the rules and practice of the Court, nevertheless set aside the order out of the goodness of his heart, because the mistake of not appealing seasonably "was not caused by the culpable neglect of the trustee or his counsel." And so the Court endeavored to extricate appellant from his dilemma and revive his lost right of appeal by the re-entry of this same order—the re-entry being made as of Nov. 24th.

That the action of the District Court in overruling the contention that the order had been entered without proper notification, in contemplation of Equity Rule IV., was right, is made clear in the case of Matter of Stafford, 240 Fed. 155, 39 A. B. R. 469, which case is strikingly parallel to the one at bar in numerous particulars. In that case a petition for discharge had been granted. Certain creditors had overlooked the entry of the order until the time for appeal had expired . They applied for an order that the discharge be opened so that they be permitted to appeal therefrom within ten days, as required by Sec. 25 (a). The Court denied the petition, and in an exhaustive opinion in which were considered the questions of time of appeal, the right

of the court to enlarge the time, or revive the opportunity when it had lapsed, as well as the requirements of the notice under Equity Rule IV, said:

> "The petitioners were in court and had due and timely notice of the filing of the opinion sustaining the report of the special master. The preparation and record of the order of discharge was purely a matter of routine, by filling up a printed blank provided for that purpose, the form of which is universal, and prescribed by the Supreme Court of the United States, and which followed the opinion as a matter of course, and required no findings of fact or law, and, indeed, no settlement of any kind. Furthermore, the right of appeal is merely a statutory privilege granted to an aggrieved party upon certain conditions, which must be complied with. It is not a right based upon principles of natural justice, and is not specifically granted by the Constitution, nor is it essential to due process of law. *Reetz v. Michigan*, 188 U. S. 505, 507, 23 Sup. Ct. 390, 47 L. Ed. 563; *Etchells v. Wainwright*, 76 Conn. 534, 540, 541, 57 Atl. 121.
>
> "It therefore follows that, if the appeal was not taken within the time fixed by statute, the right to take it was lost. *Conboy v. First National Bank of Jersey City*, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128; *Credit Co., Ltd., v. Arkansas Central Ry. Co.*, 128 U. S. 258,

261, 9 Sup. Ct. 107, 32 L. Ed. 448; *Rode & Horn v. Phipps*, 195 Fed. 414, 115 C. C. A. 316.

"And it also follows from the authorities just cited that, as the pending petition was filed after the period for the appeal had expired, it had no effect in extending the time for taking the appeal. 'When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.' *Credit Co., Ltd., v. Arkansas Central Ry. Co.*, 128 U. S. 261, 9 Sup. Ct. 107, 32 L. Ed. 448, *supra*.

"The petitioners have strenuously urged that the case is controlled by equity rule 4 of the Supreme Court (198 Fed. xx, 115 C. C. A. xx), providing that, where an order is entered in the equity docket or equity order book without prior notice to, or in the absence of, a party, the clerk shall forthwith send by mail notice of such order to the parties' solicitors. But the answer to this is that this case was never entered, and indeed was never subject to entry, in the equity docket, and that the equity order book was not an appropriate or proper place for the entry or record of the order of discharge. While bankruptcy proceedings are in the nature of proceedings in equity, in that spirit, and not according to the letter, and

while a bankruptcy court may exercise full equity powers in the ascertainment and enforcement of the equities of the parties, and while, too, appeals in bankruptcy matters are regulated, except as otherwise provided in the Bankruptcy Act, like appeals in equity, it does not follow that the rule in question goes to the extent contended for it. The bankruptcy side of the court is as distinct from the equity side as either of these is from the law or admiralty sides, and their dockets and records are separately kept.

"The controlling fact to be taken into account in disposing of this petition is that the petitioner's solicitors, if they did not actually know, had the means of knowledge, of the entry and record of the order, which was entered and recorded as of course more than 10 days prior to the filing of this petition, and after the right to appeal had expired and been lost, and, having been lost, it cannot, as was said by the Supreme Court in *Credit Co., Ltd., v. Arkansas Central Ry., supra,* be arrested or called back by a single order of court, the granting or denying of which is in the court's discretion.

"The petition should be denied and dismissed, and an order to that effect entered. So ordered."

STATEMENT OF THE CASE

The claimant, Macomber, as receiver of an insolvent corporation, presented for allowance his proof of debt in the sum of $8500 in the bankruptcy estate of Peter Thompson. Attached to the proof was a duly certified copy of the proceedings of the Superior Court of the State of Washington, from which it appeared that the issues relating to the liability of the bankrupt on account of stock subscription had been directly before that court. Findings of fact, conclusions of law and a decree establishing the nature and extent of Thompson's liability had been entered, and by the terms of the decree the receiver was directed to file a claim for the amount determined as due from Thompson, in the latter's bankruptcy proceedings. (Record pp. 2-9.)

The trustee's counsel, presumably having examined the proof of debt and the certified transcript of the legal proceedings in the state court attached thereto as an exhibit, and while the subject was still fresh in his mind, within three days after the filing of the claim filed objections thereto (Record 1) which were treated by the referee as a demurrer. And, as recited by the refere in his decision, the sole grounds of the demurrer were, "1. That the claim is based upon a contingency and not a provable claim under the bankruptcy act. 2. That the claim cannot participate in the assets of this estate for the reason that the trustee never

accepted the shares of stock and has rejected the shares and all claim thereto on the ground that it is onerous and burdensome property." (Record p. 11.)

The referee sustained the demurrer and disallowed the claim. (Record p. 14.)

On review the referee was reversed by the District Judge. (Record p. 26.)

The next step was a new set of objections in which the original grounds were incorporated; but this time, and for the first time, the objection was raised that the proceedings in the Superior Court had "no legal efficacy or force, for the reason that no process of any kind was issued which would entitle or warrant said Superior Court of King County in assuming jurisdiction of the person or the subject matter of the action."

Certain other grounds were advanced, which while they might have been properly presented in the state court in opposition to the findings and conclusions made by that court, are not, as we contend ,issues which may be tried out in the District Court,—the proceedings in the state court, as shown by the exhibit to the proof of debt, being conclusive upon these matters and not subject to collateral atack. (Record pp. 27-33.)

The contention that the claim was based upon a contingency and not a provable claim under the Bankruptcy Act was again included in this second set of objections, but of course that question had

already been exhaustively argued on the first review of the referee's decision on that point and determined adversely to the trustee. (Record pp. 20-26.)

In due course these new objection reached the District Judge and were by the latter stricken. (Record p. 39.)

This left the record without any objections to the claim, but the referee nevertheless arbitrarily again disallowed the claim. (Record p. 37.)

On review of the last mentioned order the referee was again reversed, and a peremptory order entered on September 30, 1919, allowing the claim and directing the referee to restore it to the list of claims upon the record in the cause, as an allowed claim in the sum specified therein. (Record p. 71.)

This order was vacated by the District Judge on November 24, 1919, and reentered as of that date. (Record p. 132.)

In this status the controversy is brought to this court.

ARGUMENT ON THE MERITS

I.

Under this division opposing counsel argues the merit of his first objection to the claim, this objection being in effect as recited in Error A of his petition for review, (Record p. 143) that the judgment of the state court as shown by the certified transcript attached to the proof of debt had "no legal efficacy or force, for the reason that no process of any kind was issued which would entitle or warrant said Superior Court of King County in assuming jurisdiction of the person or the subject matter of the action." This ground is clearly an after-thought of opposing counsel. He did not suggest it in his original objections to the claim. Quite the contrary. As stated by the District Court in its decision on the first set of objections: (Record, p. 20) "No question is made of the method pursued in the state court in determining the question of liability on such stock subscription."

If counsel's first objection is in the nature of a demurrer to the validity of the judgment as recited in the certified transcript attached to the proof of debt, that question must be determined by the recitals in the transcript alone. Instead of relying upon this record, which was properly before the District Court, the trustee embraced in his objections a copy of an order of the state court fixing the time for hearing of the issues before that court and determining the method of service.

This order was not a part of the transcript attached to the proof of debt. The trustee then undertook to dispute the validity of the judgment recited in the transcript, upon the ground that the order above mentioned did not constitute such process as warranted the Superior Court in assuming jurisdiction of the person or the subject matter.

The District Court was right in refusing to go behind the judgment of the state court as shown by its transcript, to enquire into the formality or legality of any proceedings in the state court upon which the judgment is founded.

The certified transcript attached to the proof of debt as exhibit "A" (Record p. 3) shows that in a court of competent jurisdiction there was a fair trial upon the issues relating to the character and extent of Peter Thompson's liability as a stockholder in the corporation known as Peter Thompson Co. The transcript shows that Peter Thompson appeared in person at the trial and participated therein. Also he was represented at the hearing by his counsel, W. W. Keyes, who was then and at all times since has been, counsel for the trustee.

The record before the District Court also affirmatively recites that R. D. Simpson, as trustee of Peter Thompson, bankrupt, had filed an appearance in the action, although he did not participate in the trial. The record also contains express recitals that all necessary petitions and orders preliminary to the hearing "were duly and regu-

larly served in the manner required by law and the order of the court upon Peter Thompson and R. D. Simpson, as trustee of Peter Thompson, bankrupt."

The record also recites that the court heard the evidence on behalf of all the parties, examined the exhibits offered by the respective parties and then proceeded to make its findings of fact and conclusions of law and decree, "*upon the issues set forth in the pleadings, and upon the additional issues orally made up between all of the parties during the hearing.*" (Record, p. 4.)

It thus appears by the duly certified transcript of the state court proceedings attached to the proof of debt, that Peter Thompson and his trustee in bankruptcy were made parties to the litigation in the state court. They *appeared* and defended. They are therefore bound by the result, irrespective of the nature of the process which summoned them into court.

The questions of the sufficiency of the service of the process to bring them into the state court are unimportant. *They appeared in the litigation.* They did not question the jurisdiction of the state court when they appeared in that court. Peter Thompson in person and the trustee's counsel actively participated in the trial and accepted the issues "set forth in the pleadings and the additional issues orally made up between all of the parties during the hearing." Therefore, the findings and judg-

ment rendered upon these issues became binding upon them. They could not in the District Court contradict this record. It speaks for itself and its recitals as to the jurisdiction of the parties, appearances, scope of the issues, etc., became *res adjudicata* in the bankruptcy court. The remedy of the trustee was by application to the state court to amend its record to correct any error or to appeal from any erroneous judgment or order which the state court may have entered to the prejudice of the trustee.

Therefore, the first objection of the trustee to the proof of debt could not be entertained in law, to contradict the solemn recitals of the record of the state court showing actual general appearances by the parties to the controversy, participation in the tiral and contest of the relief claimed by the receiver. The bankruptcy court is bound by the presumption that everything contained in the transcript of the judgment of the state court attached to the proof of debt is true, and this presumption being *juris et de jure* excludes every proof to the contrary.

In re Diblee, et al., Fed. Case No. 3884, was a bankruptcy case which arose under the old Act. In that case the Court was asked to declare a judgment of the state court void. The Court said:

> "In respect to the confession of judgment, Diblee appears to have signed it with his individual name and also with his firm name.

> The other partners did not sign it and appear to have known nothing about it; and I am asked to charge that on that ground it is illegal and void. I do not conceive that this court has anything to do with that question. If the state court has permitted the jugdment to be entered up against all three debtors and the execution to be issued, I must presume that this was done in the legal and proper way. This court must treat the record of the state court as being in due form; and therefore although the other partners appear to have had nothing to do with giving the confession of judgment I must treat the judgment and execution as not being impaired by reason of any defect of that kind."

In re Burns, Fed. Case No. 2182, also a bankruptcy proceeding under the old law, the Court was asked to review the validity of the judgment of the state court. The Court said:

> "It was argued with great force and ability by counsel for the bankrupt that we were bound to interfere by injunction because this was not a valid judgment. But how do we know that? It is entered in a court of competent jurisdiction, whose authority it is our duty to respect. If it is fraudulent or void, under the bankruptcy law, it is the province of the assignee in bankruptcy, who stands in the attitude of a defendant, to see in that

> forum that no injustice is done to the general creditors. By the first Section of the Fourth Article of the Constitution of the United States it is declared "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'; and this is equally binding in the Courts of the United States. We must, therefore, refer the assignee in bankruptcy, as the representative of the defendant, and of all creditors, to the Court of Common Pleas of Jefferson County."

In re Keiler, Fed. Case No. 7647, was also a bankruptcy proceeding in which the bankruptcy court was asked to find that certain acts of the state court were not done rightfully. The opinion of the Court on this point is best stated by quoting the syllabus (5):

> "The acts of the state court done in the due exercise of their jurisdiction, not conflicting with the proper decrees and jurisdiction of the Federal Court, are valid and binding on the Federal Courts."

McKinsey v. Harding, Fed. Case 8866, was a bankruptcy proceeding wherein proofs of debt based upon judgments of the state court were filed for allowance. The trustee opposed the allowance of these claims on the ground of usury, and also upon the ground that the mental condition of the judgment debtor or bankrupt when process was served

upon him in the state court was such that the service was not legal. The Court held:

> "The question of the jurisdiction of the District Court to go behind the judgment of the state court and enquire into the condition of the debt upon which the judgment is founded, I think has been settled adversely In re Campbell (Case 2349) and reaffirmed in re Burns (Id. 2182). The plea of *res adjudicata* is conclusive except for the insanity of the alleged bankrupt alleged or some other informality or irregularity in the proceedings in the state court. But if insanity or any other matter of fact be ground for review of the judgment, a court of qeuity is not, but a court of law is, the proper forum for redress, and a writ of error *coram nobis* in the court wherein the judgment was rendered would be the proper method of redress. * * * I am of the opinion that the District Court cannot go behind the judgment, but that the assignees, if they desire to raise the question, must sue out a writ of error *coram nobis* in the court which rendered the judgment, and have it reversed."

In re Dunn, Fed. Case 4172, a question arose over the validity of a judgment in the state court. The bankruptcy court said:

> "The court holds that inasmuch as some of the alleged judgments for large amounts

> have not been impeached in the court which rendered them or in the appellate courts of the state having jurisdiction to correct the errors in said judgments, and inasmuch as as this court is not competent to correct or annul judgments of the court courts upon appeal or petition * * * ordered, therefore, that this petition be dismissed with costs."

Michaels v. Post, Book 22 L. C. P. Co. 520, U. S. S. C. Reports, was a bankruptcy case in which the validity of the judgment was questioned. The Court, on page 526, said:

> "Foreign judgments, by rule of common law, were only prima facie evidence of the debt adjudged to be due the plaintiff, and every such judgment was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject matter, but also to show that the judgment was fraudulently obtained. Domestic judgments under the rule of common law could not be collaterly impeached or called in question if rendered in a court of competent jurisdiction."

The cases heretofore cited arose under the old bankruptcy act, but we find that the same rule has received sanction by our courts in construing the present bankruptcy law.

Robinson v. White, et al., 97 Fed. 33, 3 A. B. R. 88, was a case in which the trustee after litigating the validity of certain claims in the state court

endeavored to litigate the same matters in the Federal Court. The Court denied his right to do so in the following languege:

> "In my opinion there is no doubt whatever that the Owen Circuit Court had jurisdiction over the parties and of the subject matter, and that its decision in the case is conclusive and can only be reviewed for error in the Supreme Court of the State. This court disclaims all authority and power to revise collaterly the judgment of a court of co-ordinate jurisdiction which has taken cognizance of a cause, and has tried and disposed of the same. The judgment of the Owen Circuit Court, in the opinion of this court, until reversed by the Supreme Court of the State, is binding and conclusive alike upon the parties and upon this court."

Frazier v. Southern Loan & Trust Co., (C. C. A. 4th Cir.) 99 Fed. 707, 3 A. B. R., 710, is a case in which the validity of certain judgments of the state court was attacked by the trustee. The Court points out that "the proceedings in the state court, the record shows, were regular in every respect." The Court reasons that the trustee was authorized under the Bankruptcy Act to enter his appearance and defend any pending suit against the bankrupt. The general conclusion of the Court is best stated by quoting from the syllabus, as

reported in the American Bankruptcy Reports, as follows:

> "Where the record of the state court is regular in every respect, it may not be attacked collaterly for fraud and collusion by the trustee, where he could have set up such defense in the state court."

Handlan v. Walker, (C. C. A. 8th Cir.) 200 Fed. 566, 29 A. B. R. 6, was a case in which there was some controversy in the state court between the trustee and a claimant in which the latter obtained partial relief. He then presented to the Bankruptcy Court, a claim which he called "a balance still due, to be proved as a general claim against the estate."

The Court rejected the claim, and said:

> "As said at the outset, the controlling question is whether the judgment of the state court concludes the controversy and bars the further prosecution of the claim in the court of bankruptcy. We think it does. * * * The rule as to the conclusiveness of an adjudication when the same matter again comes up between the same parties is too familiar to require much restatement. It covers questions of both law and fact upon which their rights depend and those which might have been determined as well as those which were."

Clendening v. National Bank, 94 N. W. 901, 11 A. B. R. 245, was a case which arose in the

Supreme Court of North Dakota, in which a reverse situation is presented. In that case a claim had been filed in the Bankruptcy Court, and after some controversy was allowed. Thereafter the trustee in bankruptcy brought suit in the state court against this claimant for the recovery of a sum, alleging preference. The Court denied the right of the trustee to maintain the action on the ground that the controversy was concluded by the ruling of the Bankruptcy Court allowing the claim.

In that case, as in the case at bar, the trustee endeavored by collateral testimony to show that the Bankruptcy Court had not passed upon the merits of the particular matters which were in controversy in the suit brought in the state court. The state court denied his right to do so, saying:

> "This testimony was clearly inadmissible. It is true that parol evidence is admissible to show what was litigated in cases where the record leaves it silent; but even then the parol evidence must be consistent with the record. And it never can be admitted to contradict the record. See Bradner on Ev. (2d Ed.) Sec. 33, and cases cited. Freeman on Judgments, at Sec. 275, says: 'It is important that the evidence offered to explain a record should not contradict it. For it cannot be shown in opposition to the record that a question which appears by it to have been settled was not in fact de-

cided, nor that, where a special cause of action was in issue, a different matter was in truth litigated. In other words, where it appears by the record that a particular issue was determined, all question of fact is concluded and the court must, as a matter of law, declare such determination to exist and to be conclusive; citing numerous authorities.' "

The same Court then goes on to explain that the order of allowance of the Bankruptcy Court was conclusive on all points; that if the trustee was not satisfied, he had his remedy in the Bankruptcy Court by a review by the District Judge and by appeal to the Circuit Court of Appeals; that instead of pursuing that course, the trustee had seen fit to institute an independent action in the state Court; that the state court had no supervisory or appellate jurisdiction over the courts of bankruptcy. The Court says further:

"Whether the referee intended to decide these questions is not material. As we have seen they were necessarily involved, and were in fact determined by an adjudication. Whether his decision was right or wrong we need not discuss. It is sufficient for the purpose of this case to say that the question has been adjudicated by the order of allowance made by the referee and that the same has not been reconsidered by him or reviewed by the Judge upon a petition for review. If the trustee

> was dissatisfied with the adjudication, he had a speedy remedy in the Bankruptcy Court upon a petition for review, and also by appeal from the order of the Bankruptcy Court, if adverse to him."

And so, conversely, in the case at bar, the trustee having had his opportunity in the state court to litigate the very matters which he later sought to litigate in the Bankruptcy Court, these questions must be deemed to have been judicially determined by a tribunal having jurisdiction, and the result therefore binding upon the Bankruptcy Court. The trustee had his remedy by recourse to the state court to amend any improper order which it may have entered, or any improper recitals in its order. He had the right to appeal from the Superior Court to the Supreme Court. He did not have the right to ask the Bankruptcy Court to review the action of the state court.

While insisting that the proceedings in the state court, as shown by the proof of debt, were conclusive upon the Bankruptcy Court, and that any attack upon the legality of service, the sufficiency of the appearance by the trustee, the final decree of the state court determining the amount Thompson was obligated to pay, must be made by the trustee in the state court, we are nevertheless willing to meet the issues raised by opposing counsel, that the state had not full jurisdiction of the person and subject matter, to make the findings of

fact, conclusions of law and decree in question. It is our contention that the decisions of the Supreme Court of the State of Washington fully sanction all the acts of the state court, in question.

First, however, we desire to discuss the question of the trustee's appearance in the state court. Opposing counsel does not deny that Thompson appeared personally and participated at the trial in the state court. He does not deny that he, opposing counsel, was personally present at that trial and acted as Thompson's counsel. Until October 2, 1919, he did not question the recital in the transcript that the trustee had filed an appearance in the state court. On the last mentioned date, which was nearly eighteen months after the proof of debt had been filed, nearly five months after his final set of objections to the proof were filed, and two days after the order of September 30, 1919, finally allowing the claim in controversy, Mr. Keyes filed an affidavit *in the referee's office*, by which he attempted to contradict the recitals in the record relating to the trustee's appearance in the state court, by asserting that he had merely forwarded a stipulation on behalf of the trustee providing for a change of date of hearing in the state court, that this stipulation was as far as his appearance went, and that the stipulation had been filed in the state court without his knowledge. (Record, pp. 151, 152.)

Even if it were possible to contradict the record

by an affidavit in this matter, this objection cannot be heard because it was not seasonably made in the court below. As shown, this particular point was made by the trustee long after his objections had been filed and litigated in the District Court and after the final order of the District Judge allowing the claim. Certainly a mere affidavit filed in the referee's office some time after the litigation had been finally concluded cannot be made a part of the record on this appeal and the basis of any claim of error in this Court.

But in any event the point is without merit. Remington's Code of the State of Washington, Sec. 241, on the subject of what constitutes an appearance, says:

> "A defendant appears in an action when he answers, demurs, make any application for an order therein or gives the plaintiff written notice of his appearance. * * * Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance."

The Supreme Court of the State of Washington has held in the following cases that a written stipulation on any point constitutes a general appearance:

Jones v. Wolverton, 15 Wash. 590, 47 Pac. 36;

Robertson Mtg. Co. v. Thomas, 60 Wash. 514, 111 Pac. 795.

The Supreme Court of the United States, in the following cases, has ruled that the trustee, having appeared in the state court in any proceeding, the judgment entered therein is binding upon him:

Winchester v. Heiskell, 119 U. S. 450;
Ludeling v. Chaffe, 143 U. S. 301;
Scott v. Kelly, 22 Wall. 57.

Certainly the stipulation which counsel says he signed and sent on to arrange to change the date for the hearing, constituted written notice of his appearance in the action. It had the effect of a general appearance, and this was true whatever attitude the trustee's counsel desired to take at the time the trial was had.

Coming now to the question of the validity of all the proceedings in the state court, as recited by the transcript attached to the proof of debt, we find that on page 8 of his brief opposing counsel approves the procedure followed by the receiver to the point of the hearing, but contends that the order or judgment at that hearing should have been confined to establishing the validity of the claims or alleged debts of the insolvent corporation, and a direction to the receiver to commence proceedings against the stockholders whose subscriptions were unpaid. He then goes on to argue extensively that the court exceeded its jurisdic-

tion *when it determined the amount Thompson was owing on his stock subscription.*

Counsel quotes from and relies very strongly on *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977, as an authority. That very case expressly negatives the contention of opposing counsel. The trouble is that he has not fully and fairly stated the substance of the opinion, but has merely taken certain extracts which seem to support his case and italicized them in his brief. That case was an action by a trustee in bankruptcy to recover a judgment for unpaid stock subscription to the capital stock of a corporation. The Court stated the precise nature of the controversy in the following language:

> "The first question is whether the amended and supplemental complaint stated a cause of action. It should be noted that this amended and supplemental complaint makes no allegation (a) as to the value of the assets of the company, (b) that the defendants had notice or an opportunity to be heard at any time or place upon the validity of the claims gainst the insolvent company, and (c) *that the court, at any time after notice to the stockholders had determined what proportion of each stockholder's subscription remaining unpaid was necessary to meet the valid obligations of the company*, after the assets had been exhausted and after this finding had directed that pro-

ceedings be instituted against all such stockholders."

The Court then goes on to announce the rule as quoted by apposing counsel on page 8 of his brief. Then later on same Court quotes from *Beddow v. Huston*, 65 Wash. 585, 118 Pac. 752, as follows:

> "Any order the court might make should direct proceedings against all stockholders whose stock subscriptions were unpaid, for such an amount as, together with the admitted assets, would be sufficient to meet the liabilities and the cost of the receivership. The stockholders were entitled to notice of such a proceeding, in order that they might contest the liabilities of the corporation and their liability upon their unpaid stock. The court could then determine the liabilities, *and the proper amount to be assessed against or paid by each stockholder, and could then direct the bringing of suits to recover the amounts determined, if not voluntarily paid.* Such a liability, however, could only be determined upon notice to the stockholder and giving him his day in court. It could not be determined, as it was here, in an *ex parte* proceeding."

Later, in this same case, the Court said:

> "The action being an equitable one, the stockholder should have the right to have determined the validity of the claims *and the*

proportionate amount of his unpaid subscription which is necessary to meet the same, together with the other assets of the company, before the action proceeds against him for the full amount of his subscription."

The opinion concludes with the following language:

"The amended and supplemental complaint having failed to allege that the defendants had notice and an opportunity to be heard at some time or in some place upon the validity of the claims, *and having failed to allege that an acounting had been held by the court and the proportionate amount which each solvent stockholder should pay in order to meet the claims determined,* does not state a cause of action."

In the later case of *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256, the Court cites with approval, among others, the case of *Chamberlain v. Piercy*, *supra*, and *Beddow v. Huston*, *supra*, and quoting extensively from *Chamberlain v. Piercy*, announces the rule of procedure in the following language:

"This court has repeatedly held that, when a receiver has been appointed for an insolvent corporation, it is a condition precedent to his right to maintain an action against a stockholder for an unpaid subscription that such stockholder have notice and an opportunity to be heard upon the validity of claims against

> the insolvent corporation, and that on such notice an order be entered directing suit against the stockholders whose subscriptions are unpaid, for only such amount as, together with the assets, will suffice to meet the actual liabilities of the corporation and the costs of the receivership."

In that case, also, the Supreme Court held that the receiver had prematurely brought the suit to obtain judgment for $5,000.00 against a stockholder for unpaid stock subscription, because

> "The order upon which this suit is based, which was made in the original suit on December 5, 1913, did not make a determination of the *particular amount* or prorata share of the indebtedness that each subscriber to the capital stock should be required to pay."

And the Court reversed the court below, which had awarded judgment in favor of the receiver and against the stockholder for $5,000.00, upon the ground expressed in its opinion, as follows:

> "If we adhere to the rule announced in that case and the other cases above cited, it is clear, not only that the complaint did not state a cause of action, but also that the findings affirmatively show that the action against the appellant here was prematurely brought, *in that there had been no determination in the original receivership proceedings that $5,000.00, or any other specific amount,*

> *was either assessed as necessary to meet the valid obligations* of the company after the assets of the company had been exhausted, or that it has ever been found that the assets of the corporation are not sufficient to pay all valid claims against the corporation."

What else do these decisions of the Supreme Court of the State of Washington mean but that it is absolutely essential that there be a determination in the original receivership proceedings, of the *specific and proportionate amount* which each stockholder must pay, and a direction by the court in the original receivership proceeding to the receiver to bring suit for that certain and definite amount adjudged to be due from each stockholder, after the latter has had his day in court on a hearing to establish the validity of the claims filed in the receivership proceeding, the total amount of the available assets and the definite, fixed and proportionate amount of the unpaid stock subscription which would be necessary to collect from each solvent stockholder in order to meet the deficit.

In the nature of things, then, it is necessary that the court in the original receivership proceedings must have a hearing and determine to what extent each individual stockholder subscribed to the capital stock of the corporation, to what extent he made payment on his subscription, the amount of the deficiency that exists after computing the indebtedness of the insolvent corporation and de-

ducting the total avaliable assets, how many stockholders liable for unpaid stock subscription are solvent, and to what extent the total deficit shall be apportioned among the solvent stockholders in order to raise the required amount.

A definite and certain order must be entered against each stockholder *fixing the exact amount which he must pay*, the only limitation being that the amount so fixed, plus the amount theretofore paid by such stockholder, shall not exceed the par value of the stock subscribed by him. The amount to be assessed against each stockholder having thus been definitely ascertained, after due hearing, it becomes incumbent upon the receiver to bring a subsequent action to reduce such amount so assessed and fixed in the original receivership proceedings, to judgment against each individual stockholder, in the proper forum, which judgment may then be enforced by execution.

Certainly in such later action the only issues which can be raised by the pleadings and tried out are those mentioned as requirements of a complaint in *Chamberlain v. Piercy*, *supra*, to-wit: That the defendant had notice and an opportunity to be heard upon the validity of the claims, and that there had been an accounting by the court in the receivership proceedings, and the proportionate amount which each solvent stockholder should pay to meet the claims, determined.

Certainly in such later action to reduce the

claim to judgment the court would not reopen the enquiry made in the original receivership proceedings to determine the correctness of the amount assessed against and demanded of each stockholder. That subject was concluded by the findings and decree in the original action.

And so, in the instant case, Peter Thompson being bankrupt, the usual course of bringing suit to reduce the demand for unpaid stock subscription litigated in the original receivership proceeding to judgment, could not be pursued in the state court. The proper and only procedure was to file a proof of debt in the bankruptcy proceeding based upon the record in the state court. That was the direction of the state court, and such requirement was followed by the receiver. That record upon its face showed that all the requirements pointed out in *Chamberlain v. Piercy* had been performed; the amount Thompson was owing had been definitely assessed at $8,500.00. There remained, then, nothing for the bankruptcy court to do but to allow the claim, unless it appeared upon the face of the record that this was not such a claim as under Sec. 63 (a) of the Bankruptcy Act was provable in bankruptcy.

II.

Under this head, appellant complains that he should have had an opportunity to introduce evidence in the Bankruptcy Court in support of his

objection that Thompson's subscription to the capital stock had been fully paid by the transfer of his individual business.

For the reasons advanced in the preceding Division, the Bankruptcy Court was concluded on this point by the record of the state court, from which it appeared that that subject had been litigated in the state court receivership. The latter court expressly found that while Thompson had transferred to the corporation his individual business "in consideration of the issuance and delivery of $14,000.00, fully paid up capital stock," and while the business so transferred was of a fair value not exceeding $14,000.00, the business was in fact burdened with an indebtedness of $12,044.00 owing by Thompson, and which indebtedness was assumed by the corporation as a part of the deal by which the business was transferred to the corporation. (Rec. p. 6.)

The net result of this transaction was simply this: The corporation acquired a business worth not exceeding $14,000.00; it paid for it by the issuance of $14,000.00 of fully paid up capital stock and by paying or assuming an indbetedness of $12,044.00 owing by Thompson to his creditors. In other words, the corporation paid $26,044.00 for Thompson's business, which was worth not to exceed $14,000.00. Or, recasting the figures Thompson's equity in his business amounted to $1,956.00, being the difference between its value

of $14,000 and the indebtedness of $12,044.00. This equity, having a value of $1,956.00, was transferred by Thompson to the corporation in return for $14,000.00 of the fully paid up capital stock of the corporation. This sort of high financing is no longer permitted by the courts of the country.

A parallel case is *Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, where the facts as recited in the opinion were as follows:

> "On July 17, 1911, the corporation being then indebted in the sum of $33,837.03, and being in an insolvent condition, in an action then pending in the Superior Court, Edwin F. Lantz was appointed receiver. The assets of the corporation being insufficient to meet its obligations, the receiver, upon due notice to each of the respondents, applied to the Superior Court for leave to make an assessment and call for the amounts alleged to be due upon the subscription contract. A hearing being had, the court found that an assessment and call was necessary. Thereupon due notice was given to each of the respondents, and demand for payment made, which was refused. Suit was brought against the respondent for the amount alleged to be due from each of them. The cause was tried to the court without a jury."

It will be observed that in the original receiver-

ship referred to in the foregoing case, the court fixed the specific amount of each stockholder's liability, for which amount demand was afterwards made and refused, resulting in the suit by the receiver. One of the questions involved was the sufficiency of payment for stock subscription, which payment had been made in property, and on this subject the Court said:

> "The respondents contend that, when the stock is paid for by the transfer of property, the liquidation of the liability on the subscription contract is complete, even though there may be a material discrepancy between the par value of the stock and the value of the property transferred in payment thereof, unless there is fraud in the transaction, either actual or constructive. According to this contention, it would be immaterial whether or not the value of the property transferred to the corporation in payment of the subscrip tion was substantially equivalent to the par value of the stock. It must be admitted that the expressions of this court, from time to time, have not been harmonious upon this question. The rule contended for by the respondents appears to be supported in the cases of *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605, and possibly some others. The opposite doctrine, that the stock of a corpora-

tion is a trust fund for the benefit of its creditors and that, when the rights of creditors are involved, the stock subscribed for must be paid in money or money's worth, is upheld in the following cases: *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833. In the *Adamant case, supra*, this court in an opinion written by the late Chief Justice Dunbar, said:

> " 'The doctrine that the stock of a corporation is a trust fund for the benefit of creditors is one which is founded in equity and fair dealing, and in any event has become so well established in this country that it can no longer be gainsaid. This doctrine was announced by Chancellor Kent, as early as 1824, in *Wood v. Dummer*, 3 Mason, 309, and since that time had become the established law of this country and is termed the "American Doctrine," although, as shown in the case above referred to, the same doctrine has long been established in England; and so universally has this doctrine been accepted, in America especially, that the citation of authorities seems a work of supererogation. We will, however, quote from 2 Morawetz on Private Corporations, Sec. 820, the rule which is

announced as follows: "Debts due a corporation are equitable assets, and may be reached by creditors through the aid of a court of chancery, if the legal assets which can be reached by execution prove insufficient. The liability of the shareholders to contribute the amount of their shares as capital is treated in equity as assets, like other legal claims belonging to the corporation. This liability, together with the capital actually contributed, constitutes the trust fund which in equity is deemed pledged for the payment of the corporate debts." This being true, then it must necessarily follow, for the protection of these creditors who dealt with these corporations, that the stock subscribed for must be paid in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of $100,000.00, when in reality the capital stock, which is and must be under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation is to that extent doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious.'

> "We think that the rule as laid down in the *Adamant case* is not legally but ethically sound, and all the decisions of this court which are not in harmony with the views therein expressed are overruled."

To the same effect is the later case of *German-Am. State Bank v. Soap Lake S. R. Co.*, 77 Wash. 332, 137 Pac. 461.

III.

Under this head the trustee argues that he should have been heard upon his objections to the effect that of the creditors whose claims had been filed in the receivership proceedings, some had been paid in full, and some were not proper claims against the insolvent corporation, but were debts contracted by Thompson individually before the corporation was organized. But these matters were certainly proper issues in the original receivership proceedings on the hearing based upon the order of March 23, 1918.

Counsel on page 9 of his brief quotes from *Chamberlain v. Piercy, supra*, and argues vehemently that *"the validity of the claims or alleged debts of the insolvent company,"* and a direction to proceed against the stockholders whose subscriptions were unpaid, were the only proper matters which could be adjudicated at such hearing. And the state court did adjudge at such hearing that claims aggregating $7,500.00 were "a true, just

and valid indebtedness against said Peter Thompson Co., a corporation." (Record, p. 5.)

How can the trustee now contend that the validity of these claims of creditors thus established in the receivership proceeding may again be tried out in the Bankruptcy Court through the medium of objections to the record of the state court attached as an exhibit to the proof of debt?

Further discussion on this point is unnecessary.

IV.

What has been said in the previous Division will apply to the argument of the trustee in support of Objection IV. or Assignment of Error D.

If for any of the reasons therein mentioned any of the creditors who filed claims in the receivership proceeding in the state court were estopped from asserting their claims against the insolvent corporation, such matters may have been, and certainly could have been, brought out at the hearing in the state court in which both Thompson and the trustee's counsel participated. That hearing was for the express purpose of passing "*upon the validity of the claims or alleged debts of the insolvent company*," as contended by opposing counsel himself on page 9 of his brief.

The finding of the court below that claims aggregating $7,500.00 constituted "a true, just and valid indebtedness against said Peter Thompson

Co., a corporation," precluded any further enquiry on that subject in the Bankruptcy Court.

V.

Under this division, counsel for the trustee argues that the claim of Macomber, as receiver, was based upon a contingency, and was not an existing debt at the time of the adjudication of bankruptcy, and hence, not a provable claim under Sec. 63 (a) of the Bankruptcy Act.

That ground of objection was urged by the trustee in his first set of objections to the proof of debt, and was overruled by the District Judge after exhaustive argument and submission of briefs by both counsel. The opinion of the court below on this point is found on page 20 of the Record.

The trustee petitioned for a rehearing, which was granted, and the opinion of the Court on the rehearing is found on page 22 of the Record.

We respectfully refer this Court to the opinions of Judge Cushman in the consideration of this subject.

It would seem to us that it was the duty of the trustee to appeal from the ruling of the District Court seasonably after the determination of that objection, but instead, the trustee filed a new set of objections, in which this same objection was incorporated. May he now by appeal or petition for review ask this Court to consider the propriety of the ruling made by the District Court on this

very same point as far back as January 22, 1919? (Record, p. 26.)

If it be held that this question is seasonably before this Court, we concede that it is such an objection as could properly be presented to the Court for consideration in determining whether upon the face of the proof of debt and exhibit attached thereto, it appeared that the claim was one provable under the Bankruptcy Law.

In our opinion, the law is decisively adverse to the contention of the trustee.

The Court should remember that the subject of stockholders' liability on stock subscription is a liability which is generally created by statute. The character of the obligation differs in each state. In determining this question, it is essential that the Code and decisions of the Supreme Court of the State of Washington be considered in deciding the nature of a stockholders' liability.

Remington's Code, Sec. 3698, reads:

> "Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise."

It seems to us that the case of *Johns v. Clother*, 78 Wash. 602, 139 Pac. 755, defines the character of a debt owing from a stockholder by reason of unpaid stock subscription. There the court, after quoting Sec. 3698 Remington's Code, said:

> "The Constitution and the statute create a liability as a matter of law to the extent of the value of the stock and no more, from the very fact of subscription, regardless of any attempted limitation of contract of subscription. *This liability may arise as an implication of law, even when there was no formal subscription.*"

We contend absolutely that this debt is not based upon a contingent claim, but is that character of debt covered by Sec. 63 (4) of the present Bankruptcy Law; that is to say, it is "founded * * * upon a contract, express or implied," and is therefore a provable debt against the estate.

We rely most strongly upon the case of *In re* Benjamin L. Rouse, 1 American Bankruptcy Report, 393. This case is squarely in point. The opinion is long and exhaustive. It was written by Harold Remington, then Referee in Cleveland, the author of Remington on Bankruptcy. That case involves the question of the provability of a claim against a stockholder for unpaid stock subscription. The Referee quotes the law and procedure relating to the enforcement of stockholders' liability in the State of Ohio, and this court will observe that they are analagous to the law and procedure of our own state. The Referee holds

> "That the statutory liability of a stockholder to answer for the unpaid debts of an insolvent corporation is not only a liability created

by statute, but is also a debt founded upon a contract."

He therefore rules that it is provable in bankruptcy under Division A of Section 63. The Referee, further discussing the time when the liability of the stockholder begins, holds (page 402):

> "The liability begins when the creditor gives his credit; is fixed when the corporation becomes unable to pay up the judgment against it for the debt, or what amounts to the same thing, when it makes a general assignment in a court of insolvency; and is payable when suit is begun or other demand made on his stockholder's liability."

This court will also observe that Referee Remington, in the latter part of his opinion, points out the method by which the amount of the stockholder's liability may be ascertained. He states that the bankruptcy court may either require the procedure in the state court (which was followed by the claimant in this estate) or, where the facts are simple and not complicated, the referee himself may liquidate and determine the proper amount of the stockholder's liability, and then allow that amount as a provable debt.

We also desire to call the Court's attention to the note contributed by Mr. Remington some time after he had written the opinion in the case above quoted, in which, in the light of later decision, he shows that his original ruling was correct. In

that note the case of *Garrett v. American File Co.*, 110 U. S. 288, cited by the trustee, is mentioned.

In the case of *Hays v. Wagner*, 18 American Bankruptcy Reports, 163; 150 Federal 533 (C. C. A. Ohio) the court held that a claim for unpaid stock subscription was a provable claim against a bankrupt, and could be used as one of the claims to join in the filing of an involuntary petition in bankruptcy.

Remington on Bankruptcy, 2d Ed., Vol. 1, Sec. 709, says:

> "Stockholders' secondary liability for debts of the corporation in some of the states is not only a debt created by the statute, but is also one founded upon an implied contract, and it is provable in bankruptcy if the circumstances are such that the claimant could have maintained a suit to enforce the stockholders' liability. It is fixed and not contingent, for all the facts necessary to fix it occurred. It is unascertained and unliquidated, and upon liquidation being made, it becomes provable and allowable."

The author cites numerous cases in support of the foregoing text. Among others is the case of *Dwight v. Chapman*, 12 American Bankruptcy Reports, 743; 64 L. R. A. 793; (Sup. Ct. Ore.) holding that a receiver appointed to collect the judgment on the stockholders' liability may prove the claim against the bankrupt stockholder.

Remington also cites in support of the foregoing text the case of *In re* Walker, 21 American Bankruptcy Reports, 132; 164 Federal 680; (C. C. A. Calif.) This case involves the California law, which provides that stockholders of a California corporation are liable for their proportion of all the debts of the corporation during the time they were such stockholders. The court holds that such a claim arises out of contract, is therefore a provable claim under the express terms of Sec. 63 of the Bankruptcy Act, and that such claim may be used in filing an involuntary petition in bankruptcy against the debtor.

Remington on Bankruptcy, 2d Ed., Vol. 3, Sec. 2742, reads:

"Stockholder's liability for the debts of the corporation is discharged by the stockholder's own bankruptcy if the facts essential to the maintenance of a stockholder's liability suit have already occurred."

Remington on Bankruptcy, 2d Ed., Vol. 1, Sec. 805, reads:

"Claims against a bankrupt stockholder for unpaid stock subscription are valid in bankruptcy."

In re J. L. Bass, 215 Fed. 275, 32 American Bankruptcy Reports, 766, inferentially holds that a claim by a receiver of an insolvent corporation against the bankruptcy estate of a stockholder based upon unpaid stock subscription may be proven

if it is established that the receiver of the insolvent corporation needs the funds to pay the debts of a corporation.

The case of *Van Tuyl, Jr., v. Schwab, et al.*, 161 N. Y. Supp. 328, 38 American Bankruptcy Reports, 161, in a case decided in 1916 by the New York Appellate Division, and is very much in point. In that case the Superintendent of Banks of the State of New York brought an omnibus suit against the stockholders of the insolvent Carneige Trust Company to enforce a stock subscription liability. One of the respondents, named Moore, pleaded a discharge in bankruptcy, and the question arose whether or not Moore's discharge in bankruptcy relieved him from his obligation and liability as a stockholder of the trust company. Or, as the court put it, "in other words, was his obligation and liability on April 12, 1911, a provable debt under the bankruptcy act?"

The court discusses quite fully the question of the time when the debt became provable and the time when the liability accrud. The court discussed the contention of the plaintiff that the liability of a stockholder does not rest upon contract, but upon statute, and that it does not arise until the insolvency of the corporation has been ascertained and an assessment has been levied upon the stockholders. The court disagreed with this contention of the plaintiff and held that the liability of a stockholder was contractual in its

nature; that there was an implied contract on his part entered into when he acquired his stock that he would be liable in the manner and to the extent prescribed by statute, and that such liability accrued, not when the company is ascertained to be insolvent, but when it acquires the indebtedness for which the statute renders the stockholders liable. In short, the liability is absolute at the time the stock is subscribed, but the enforcement of it, only, is postponed until the insolvency of the corporation takes place and an assessment is levied upon the stockholders.

The court concludes its opinion, which sustained the defendant Moore's plea of discharge, in the following language:

> "Strangely enough, there seems to be a notable dearth of authority upon the precise question as to whether such an obligation as defendant assumed as a stockholder of the trust company is a debt provable in bankruptcy. It was, however, directly passed upon by Harold Remington, Esq., the well known writer upon the Bankruptcy Act, when sitting as a Referee in Bankruptcy. In a careful, and well-reasoned opinion, too long to be quoted here, he held distinctly that such an obligation as attached to defendant as a stockholder of the trust company at the date on which the petition in bankruptcy was filed, was provable as a debt against his estate. Matter of

Rouse, 1 Am. B. R. 393. With his reasoning and conclusion we fully concur. If provable, it was discharged by the discharge in bankruptcy."

The cases we have thus far cited arose under the present Bankruptcy Act. An examination of authorities in point, under the old bankruptcy law discloses that they are likewise in harmony with the decisions of the courts under the pending Act.

The case of *Irons v. Manufacturers' National Bank*, 27 Federal Reporter, 591, was decided by the Circuit Court of Illinois. In that case a suit was commenced to enforce individual liability of stockholders of an insolvent bank. One of the stockholders pleaded a discharge in bankruptcy, and the question arose whether the liability of this debtor as a stockholder of the bank was a provable claim at the time the bankruptcy was pending, and if so, whether the bankrupt was discharged from such liability when he obtained his discharge from the bankruptcy court, in due course.

The court in its opinion (page 595) holds in effect that when the petition in bankruptcy was pending the individual liability of the shareholders of the bank had become fixed. The debts of the bank were a fixed quantity. The amount of the stock subscription of the bankrupt shareholder was easily provable, and the receiver of the insolvent bank might have proven this claim for individual liability against the estate of the bankrupt, al-

though the assessment had not actually been made at the time the petition in bankruptcy was filed.

Judge Blodgett, who wrote the foregoing opinion, referred to the case of *Garrett v. American File Co.*, *supra*, which had been cited by the receiver as an authority for overruling the bank's plea of discharge, apparently upon the ground that the debt for unpaid stock subscription, not being a provable claim against the estate, it was not extinguished by the bankrupt's discharge. However, Judge Blodgett says that the decision in the Garrett case was based upon peculiar facts in the record.

The case of *Carey v. Mayer*, 79 Federal Reporter, 926, is one decided by the Circuit Court of Appeals for the Second Circuit, which is strongly in point on the facts with the case at bar. In that case, one Mayer had subscribed to the capital stock of a Virginia corporation and had paid only a portion of his subscription. Later on, the corporation made an assignment for the benefit of it screditors by a common law deed. The Court in its opinion says:

> "By this assignment that part of the assets of the corporation which consisted in unpaid subscription for stock passed to the trustee, but the collection of this class of assets by actions at law could be started in motion only by a call made by the president and directors, or, failing that action, by a court of equity at the instance of the trustee or of the creditors."

Some time later a suit in equity was commenced, the object of which was to compel a call for so much of the unpaid subscription as would suffice to pay the debts of the company. A decree was made by the court which found the amount due the creditors, and made a call upon the stockholders to pay a certain percentage of the par of their stock, in order to administer the trust and pay the debts.

Subsequent to the assignment by the corporation and prior to the commencement of the equity suit to enforce the collection of the unpaid subscription, Mayer, a stockholder, was adjudged a bankrupt and later on he was discharged from all debts and claims which were provable against his estate and which existed when he filed his petition. Subsequently he was sued by the representativ of creditors of the insolvent corporation to recover the amount of the calls for unpaid stock subscription, and to this action the discharge in bankruptcy was pleaded in bar, and the Court directed a verdict for the defendant.

On appeal, the Circuit Court of Appeals affirmed the judgment, holding that the liability was a provable debt even before the calls were directed to be made by th equity court. Th Court says in th course of its opinion:

> "In the case of a liability for an unpaid subscription for stock, the seed of the liability is the act of subscription, and when notorious

> insolvency takes place and it becomes manifest by the act of the corporation that the subscriptions must pay the debts, the liability has also become manifest, but it requires a call or assessment to make it complete and of certain amount."

In the case above cited the calls for assessment had been made after the bankrupt had gone into bankruptcy, and in discussing the time when the obligation was created and the debt became provable, the court held that when the fact of insolvency has been confessed and an assignment for the benefit of his creditors has been made, nothing remains to be done in order to make the liability a fixed debt but to ascertain the amount of the assessment, by the intervention either of the corporation or of a court of chancery, and by reason of these facts the defendant's obligation as a stockholder became a liability when the assignment was made by the corporation on the ground of insolvency. The ascertainment of the amount of the liability was an incidental matter which could be made certain before final distribution of the bankrupt shareholder's estate and the claim thus be proven in said estate.

We thus find from the text and the cases hereinbefore cited that a claim based upon unpaid stock subscription under the laws of the State of Washington, and states having similar statutes, is a claim which may be used in a creditors' petition

in involuntary bankruptcy. It is a claim that is discharged by the discharge of the debtor in bankruptcy. It is a claim that may be proven against the estate of the stockholder if bankruptcy accrues or is established at the time the stockholder acquires his stock. It is based upon a contract, express or implied. The enforcement of the liability and the amount which the stockholder may have to pay may not be ascertained until later, as in this instance, after Thompson had gone into bankruptcy, but, as has been stated, his liability was created at the time he subscribed to the stock of the Peter Thompson Co. It was in existence at the time he filed his voluntary petition. It was therefore a provable debt to the extent definitely ascertained at the time when the proof of debt was filed with the Referee.

VI.

Finally, the trustee argues the merit of his objection that because the trustee never exercised any ownership over Thompson's stock in the insolvent corporation, the property could not be charged with any claim arising out of the unpaid stock subscription.

The record shows that the corporation had gone out of business, had become insolvent and its corporate stock worthless long prior to the bankruptcy of Peter Thompson. Naturally the trustee would take no interest in the paper certificates of stock which were then the only tangible remains of the

venture, so far as Thompson was concerned. But could Thompson's estate escape liability for any deficiency in the payment of the stock by the mere refusal of the trustee to exercise any interest in these paper certificates?

Had Thompson offered a composition in bankruptcy could he have ignored this liability in procuring the necessary majority of claims in amount and number, on the mere ground that the trustee had not taken these certificates in hand?

The trustee mainly relies for support on the case of *American File Co. v. Garrett,* 110 U. S. 288; but that case is not at all in point. It really does not involve the question of stock liability for unpaid stock subscription. That case originated in Rhode Island, which has some peculiar statute making each stockholder individually liable for the debts of the company in the event the company omits to file certain statements respecting its business, in the office of the Clerk of the Town. This liability seems to be transferred as a matter of course from one holder of stock to another. It seems that some effort was made to hold an assignee in bankruptcy liable under the provisions of this statute, and the Supreme Court simply held that under the peculiar facts of that case, the assignee had never really become the holder and owner of these shares of stock, and therefore could not be held for this penalty prescribed by the Rhode Island statute.

In the case of *Irons v. Mfg.'s Nat. Bank*, 26 Fed. 591, mentioned on page 29 of opposing counsel's brief as sustaining his position, Judge Blodgett, writing the opinion, referred to the case of *American File Co. v. Garrett* as based upon the peculiar facts in the record of the case, and therefore not contradicting the proposition that a debt for unpaid stock subscription was a provable debt.

We direct the Court's attention to the able opinion of the District Judge, which appears on page 25 of the Record, in which he discusses *American File Co. v. Garrett*, and holds that it has no application whatsoever to the case at bar.

If the appeal and petition for revision are not dismissed, the judgment of the court below should be affirmed upon the merits of the controversy.

Respectfully submitted,

LEOPOLD M. STERN,

Attorney for Appellee.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of PETER THOMPSON, Bankrupt. R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt, *Petitioner,* —vs.— L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a Corporation, *Respondent.*	No. 3433

ON MOTION TO DISMISS PETITION FOR REVIEW.

REPLY BRIEF

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ON MOTION TO DISMISS PETITION FOR REVIEW.

REPLY BRIEF

In his motion to dismiss appellant's petition for review under Section 24 (b) counsel takes as his premise that a claim of over $500.00 has been rejected, and hence the remedy must be by appeal.

Assuming that the method by appeal is the exclusive method of bringing before the Appellate Court a review of the allowance or rejection of a

claim of $500.00 or over—which, however, we do not concede—it is manifest that the allowance or rejection of the "claim" or "debt" in the instant case is not the allowance or rejection of a claim or debt as is contemplated under Section 25 (a).

A brief review of the facts discloses that the question at issue arises out of a "proceeding" in bankruptcy. Just one year, lacking a few days, after Thompson had been adjudicated a bankrupt, a receiver was appointed for a corporation in which Thompson was a stockholder, and this receiver, under the assumption that Thompson had turned over insufficient property in payment of his stock subscription, undertook to bring an action in the state court, under a show cause order, to subject the assets in the hands of the bankrupt's trustee to the payment of this alleged balance.

The referee's order (pp. 129-130) discloses,

> "I FIND that the claim of said L. H. Macomber as receiver is in proper form and is entitled to be filed as a claim in said estate, to which ruling the trustee through his attorney, W. W. Keyes, duly excepts, and his exception is allowed. I further
>
> "FIND, however, that the creditors represented by the said L. H. Cacomber as receiver, have participated in the estate of the said Peter Thompson Company, and have received through said source a greater percentage upon their indebtedness than the other creditors whose claims have been filed and allowed in this estate, and being of the opinion heretofore expressed as shown by the files and records here-

> in, that the creditors of Peter Thompson, and those creditors represented by L. H. Macomber as receiver, should share equally and ratably, and the said creditors represented by said L. H. Cacomber as receiver having refused to pay back or to tender the several amounts paid to them under such receivership proceedings, the same are not therefore entitled to participate in the funds of this estate."

Again in his certificate of review on page 70, in explaining the above order, he says: "The present order bars claimant from sharing in this fund (meaning the fund derived from the sale of the merchandise assets of bankrupt, W. W. K.). But it leaves him free to share in any other fund or estate that may be discovered."

On review to the District Judge, the latter put the claim in the same classification with other general claims of the estate. The trustee, while asserting at all times that the alleged liability of Thompson on his stock subscription was such as would not be discharged through bankruptcy, nevertheless accepted the ruling of the referee, and never appealed therefrom. It follows, therefore, that the question to be reviewed is the same question certified to the District Judge by the referee, viz., "Whether or not the claim of L. H. Macomber, receiver, should be *allowed . . . to participate in the funds now in the hands of the trustees*" (p. 71).

The last order made by the referee (pp. 129-30) expressly holds that the claim "is in proper form and is entitled to be filed as a claim in said estate."

Both the referee and the District Judge have allowed the claim, the former denying participation in certain funds realized from the merchandise assets, the latter holding that the claim should be given the same rank as other unsecured claims. It is not a question of allowance or rejection of a claim or debt. It is a question of rank of a claim that has arisen in the course of the bankruptcy proceedings, whereby an effort is being made to subject certain assets, or the proceeds therefrom, to the satisfaction of the alleged claim, brought into being nearly a year after the adjudication of the bankrupt. No question of fact is involved. We assert that the proper way to submit a question of this character is by a petition for review. In brief we are asking this Court "to superintend and revise in matter of law the proceedings" of a court of bankruptcy.

It is true that the trustee at all times insisted that the claim should be denied participation in any fund of the estate, regardless of the source of the fund. The Honorable Referee, however, did allow the claim, but held that until the creditors represented by the trustee had received a percentage on their debts equal to that received by the creditors represented by the said Macomber as receiver, they should not be allowed to participate in the fund in the hands of the trustee (pp. 129-30). The Referee's certificate on review (pp. 66-71) states very clearly the position taken by him.

> *In Euclid Nat. Bank vs. Union Trust & Deposit Co.*, 149 Fed. 975,

a very similar question arose to the one under consideration. An order was made denying a claimant participation in the individual assets of the bankrupt until the individual creditors had been paid. The Court says: "A preliminary question is raised which it is necessary first to dispose of, namely, the appellees moved to dismiss the petition on the ground that the relief sought could only be secured by appeal pursuant to Sections 24 and 25 (a) of the bankruptcy law and not on a petition for review. It is true that the last named section, paragraph 3, contemplates that appeals should be taken in case of the allowance or rejection of a debt or claim in excess of $500.00 and that that is the appropriate remedy, and not a petition for review; but we think, upon a careful perusal of the two sections in question, it will be apparent that the action complained of was not such a rejection of the debt claimed as is contemplated in the act regarding appeals. Neither the referee nor the lower court rejected the debt of the petitioners but denied to the holders of the debts the right of participation in the individual assets of the bankrupt until the individual creditors had been first paid. The petitioners would share to the full extent of their debts in any distribution of the individual estate after the extinguishment of the individual debts, had there been sufficient assets. The motion to dismiss should therefore be denied."

Judge Lurton, in

In re Mueller, 135 Fed. 711, 714,

says:

> "If, however, the debt or claim is not disputed, and the only question sought to be revised is one of rank, or priority of the claim by reason of its character, or some lien in its favor against the property of the bankrupts, it has been held by the Circuit Court of Appeals for the Seventh Circuit that, so far as the order or decree depended upon a question of law, it could be revised upon a petition for review." Citing
>
> *In re Rouse vs. Hazord Co.*, 91 Fed. 96;
>
> *In re Richards*, 96 Fed. 935;
>
> *Courier Journal Co. vs. Brewing Co.*, 101 Fed. 699.

In *Burleigh vs. Foreman*, 125 Fed. 217, 219 (First Circuit), the Court says:

> "So with reference to this provision of the bankruptcy act of 1898, on which appellee relies, it is not unreasonable to hold that a dissatisfied litigant may appeal as to both the law and facts, or may, where a question of law is concerned, take the less expensive and the more summary manner of raising that alone by a revisory petition. Certainly, no detriment could could come therefrom, because, in the latter case, the party aggrieved waives all questions of fact which is for the advantage of the winning party in the court below."

Petitions for review and appeals are fully discussed in this case, and we especially call the Court's attention to this decision.

See, also,

Hutting Sash Co. vs. Stitt, 218 Fed. 1;

Snow vs. Dalton, 203 Fed. 843.

We urge most respectfully, at the same time emphatically, that the question now before this Court is not one of allowance or rejection of a claim, but one of classification. Again quoting the final order of the referee:

> "I find that the claim of the said L. H. Macomber as receiver is in proper form and is entitled to be filed as a claim in said estate, to which ruling the trustee, through his attorney, W. W. Keyes, duly excepts," etc.

And, as already pointed out, the referee was very careful to point out in his certificate on review in referring to his final order:

> "The present order bars claimant from sharing in this fund. But it leaves him free to share in any other fund, or estate, that may be discovered."

Counsel cites *First National Bank vs. State Bank*, 131 Fed. 430, and quotes therefrom. An examination of this case discloses that one question only was considered by the court, viz., whether the trial court had jurisdiction to entertain a petition for rehearing after an appeal had been perfected.

ON MOTION TO DISMISS THE APPEAL.

We think opposing counsel rather begs the question. He assumes that this case comes under one of the especially enumerated conditions prescribed in Section 25 (a) for an appeal in ten days.

Decisions of trial courts may be reviewed by the Circuit Court of Appeals in one of three ways, viz.:

(1) By petition for review. (2) Appeals under the general appellate jurisdiction as conferred by Section 24 (a). (3) By appeal upon the allowance or rejection of a claim of $500.00 or over. Proceedings under (1) and (2) must be taken within six months, and under (3) within ten days.

Our contention is that the matter in controversy between the representatives of the two classes of creditors, that is, the trustee in bankruptcy on one hand, and the receiver of the corporation on the other, if not reviewable by petition under Section 24 (b) is distinctly a controversy contemplated under Section 24 (a) and appealable under the general jurisdiction conferred thereunder. If, however, we should be wrong as to the foregoing contentions, the appeal was seasonably perfected even under Section 25 (a), as we shall presently show.

The trustee's attorney finds ready sympathy in the language used in

Thomas vs. Woods, 173 Fed. 585, 587.

> "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. *In re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Coder vs. Arts*, 213 U. S. 223, 232, 29 Sup. Ct. 436, 54 L. Ed. —. The classi-

fication of matters in bankruptcy as 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a 'bankruptcy proceeding' is brought under review in an appellate court, it presents a 'controversy,' and of necessity this is also a 'controversy arising in a bankruptcy proceeding.' The phrases, therefore, upon which this classification is based are tautological. Again, the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544; U. S. Comp. Stat. 1901, p. 3418) itself uses the phrase 'proceedings in bankruptcy' in a double sense. Section 23 provides as follows:

'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees,' etc.

'Here the term "proceedings in bankruptcy" embraces "controversies arising in bankruptcy proceedings," as well as "bankruptcy proceedings proper," and sets them both over against plenary suits between trustees and adverse claimants (instituted by bill or complaint, with subpoena or summons), touching rights or property not in the custody of the court. In Section 24b, however, the terms "proceedings in bankruptcy" as construed by the courts, has been given a narrower meaning, and has been set over against "controversies arising in bankrupty proceedings," as used in Section 24a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those "contro-

> versies arising in bankruptcy proceedings" on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy. The confusion that has resulted from the attempt of the courts to apply this classification to actual litigation affords strong support for the decisions of this court that the methods of review provided by the bankruptcy act are not mutually exclusive but cumulative. *In re McKenzie*, 142 Fed. 383, 73 C. C. A. 483; *Dodge vs. Nortin*, 133 Fed. 363,66 C. C. A. 425; *In re Holmes*, 142 Fed. 391, 73 C. C. A. 49'."

It will be remembered that the present controversy arises out of a mongrel judgment obtained by the receiver in the state court. Under an order entitled "Order appointing time for hearing petition for call and assessment" (p. 28) he secured from the state court a purported decree, among other things directing the receiver "to file a claim for said amount in the bankruptcy proceedings," etc., and "to take any and all steps and proceedings that may be necessary looking to the collection of said claim" (p. 9). In passing it may be noted that finding 3 (p. 5) of the state court says: "That the debts of the Peter Thompson Co., a corporation, at the time of the appointment of the receiver herein were *approximately* $7,500, and said sum is now a true, just, and valid indebtedness," etc. The next finding, 4 (p. 5), says the expenses of administration "*will not exceed* $1,000." How the "expenses of administration," even though determined, could possibly be a proper claim to be paid by the creditors of the bankrupt, is open to wonderment.

Judge Lurton in *In re Mueller*, 135 Fed. 713, says:

"Cases which are appealable are of two classes: 1. There is the broad appellate jurisdiction conferred by Section 6 of the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), by appeal or writ of error, from the final decisions of the District Court 'in all cases other than those provided for in the preceding section of this act.' That the decree or judgment is one arising in a controversy relating to the settlement of the bankrupt's estate does not make it any the less appealable or reviewable by writ of error. Upon the contrary, Section 24a provides as follows:

'The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. U. S. Comp. St. 1901, p. 3431.'

"That neither the fifth nor sixth section of the act of 1891 (26 Stat. 827, 828; U. S. Comp. St. 1901, pp. 549, 550) was changed by the bankrupt act was expressly decided in *Bardes vs. Hawarden Bank*, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, and *Elliott vs. Toeppner*, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200. By 'controversies arising in bankruptcy proceedings' is meant those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's

estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.

"2. The time within which a writ of error may be taken out or an appeal prayed from a judgment or decree of the District Court in 'a controversy arising in bankruptcy,' such as is referred to in Section 24a, is the time prescribed by the eleventh section of the judiciary act of 1891 (26 Stat. 829; U. S. Comp. St. 1901, p. 552), namely, six months."

If the instant controversy is one "arising in bankruptcy proceedings" then it should be reviewed under the authority of 24 (a). Just what is a "controversy arising in bankruptcy proceedings" is not unmixed with doubt, at least to the writer. Judge Lurton says "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention, or otherwise, between the trustee representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors."

If Peter Thompson had not been in bankruptcy, clearly under the authority of *Chamberlain vs. Piercy*, 82 Wash. 157, 143 Pac. 977, and *Beddow vs. Huston*, 65 Wash. 585, 118 Pac. 752, it would have been necessary to sue in a proper tribunal to collect his stock subscription, unless, of course, he voluntarily paid the same. Certainly no judgment could have been taken against him on a show cause order. The receiver has "short cut," so to speak, and now claims that he has never undertaken to

assert a right or interest adverse to the bankrupt or his general creditors, but that his claim is like any other debt in existence at the time of filing the petition in bankruptcy. In brief, if it was necessary to sue Thompson, he having a right to his defenses, it is none the less a right which his trustee should have, and when the receiver submits himself to the forum of the bankruptcy court, instead of suing in a regular way in the state court, as he might have had a right to do, we say that a controversy is presented arising in bankruptcy proceedings.

Even if the "judgment" procured by the receiver is valid in every respect, and even if the state court finds that Peter Thompson did not pay in full for his stock subscription, it would follow, we think, that when an attempt is made to subject the assets in the hands of the trustee to the satisfaction of that judgment, there is presented most decidedly a question that is adverse to the rights of the creditors represented by the trustee. The receiver can not save himself by calling it a "claim," and hence provable as other general claims, when, if, as a matter of fact, some form of litigation yet remained to determine its status. Instead of suing Thompson or the trustee in bankruptcy upon their refusal to pay, he has submitted the matter to the jurisdiction of the bankruptcy court, and we urge most strongly that a controversy arising in bankruptcy is presented, and hence appealable under the broad appellate jurisdiction. The present controversy is not un-

like that in *In re Doran* (6th Circuit), 18 A. B. R. 760, 154 Fed. 468:

> "The petitioner, Moorman, brings this matter here by petition for review and also by appeal, being doubtful, apparently, of the proper remedy. He filed a petition in the bankruptcy proceedings praying for the allowance of a claim for a debt of the bankrupt and for priority by reason of a mortgage given by the bankrupt securing it. Upon a hearing before the referee, his claim for the debt was allowed, but the priority claimed was disallowed. He applied for a review of the order disallowing priority to the district judge, who affirmed the order of the referee. This left nothing in controversy but the question of the priority of lien which the petitioner claimed under his mortgage. If the decision had been against his claim of debt, he could have brought the case here by appeal under Section 25a of the Bankruptcy Act, and its right to priority could have been settled if the debt was established, because the lien was a mere incident of the debt. This was so held by this court in *Cunningham vs. Ins. Bank*, 4 Am. B. R. 192, 103 Fed. 932. But the claim for the debt having been allowed, only the incident remained, and that of itself was not sufficient to support an appeal under Section 25a. The order was a decree in a controversy in a bankruptcy proceeding and not an order in a bankruptcy proceeding proper and, therefore, is not reviewable under Section 24b. But we think the order of the District Court complained of may be reviewed under the authority of Section 24a, which authorizes an appeal to this court, or a writ of error in controversies of this sort, in accordance with our decision. *In re First National Bank of Canton*, 14 Am. B. R. 180, 135 Fed. 62. Such an appeal is one which is in conformity with appeals in other than bankruptcy cases."

In a very late case,

Matter of Dressler Producing Corp., 44 A. B. R. 457 (Second Circuit December, 1919),

the court says:

"The petitioner seeks to have this cause reviewed both by a petition to revise and by an appeal. Evidently they have been doubtful as to their remedy. We have considered the cause as coming to us pursuant to a petition to revise rather than an appeal. Summary proceedings are reviewable only by a petition to revise. In *re Goldstein* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887; *Gibbons vs. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 222 Fed. 826. Where the court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant itself, the action may be reviewed by a petition to revise. *Mueller vs. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Shea vs. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877; *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 726; *In re Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 54.

"There is a clear distinction between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings'. Bankruptcy proceedings, broadly speaking, cover questions between the alleged bankrupt and include the matters of administration generally, such as appointments of receivers and trustees, allowances of claims and matters to be disposed of summarily. All of these matters occur in the settlement of the estate. *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778. *The determining factor or the important consideration for ascertaining to which class the particular application belongs, is to determine the ob-*

ject and character of the proceedings sought to be reviewed. If it is a controversy arising in bankruptcy proceedings, the Circuit Court of Appeals exercise their jurisdiction as in other cases, under Section 24a. If the controversy pertains to proceedings in bankruptcy relative to the adjudication and the subsequent steps in bankruptcy, it is one which may be revised in matters of law upon notice and a petition by the aggrieved party.

"Petitions to revise bring up questions of law only; appeals both of law and of fact. *Elliot vs. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50.

"If the question arises in an independent suit to determine the claim necessary for the settlement of the estate, or if it arise in one of the cases specified in Section 25a, review may be had by appeal, but if the question pertains to and arises in a bankruptcy proceeding and does not fall within either of the cases specified in Section 25a, review may be had by petition to revise in matter of law."

The matter of collecting stock subscription by a receiver of an insolvent corporation in the State of Washington is not open to doubt or dispute. Briefly, it is incumbent upon the receiver to have a preliminary hearing, at which time the receiver's application is heard, and also the nature and validity of the debts of the corporation, and then the court *may not enter a judgment* but an order "directing proceedings against the stockholders". (*Chamberlain vs. Piercy, Grady vs. Graham, Beddow vs. Huston, supra.*)

The *character* of the proceedings sought to be reviewed by the court is fully discussed in the trus-

tee's brief, pp. 4 to 10, inclusive, and we respectfully direct the Court's attention to the same.

Under this state of facts, the question is presented as to whether or not the representative of the corporate creditors has brought about a "controversy arising in the bankruptcy proceedings".

As pointed out heretofore, we are not now concerned with the question of a rejection or allowance of a claim of $500.00 and over. The referee has allowed the receiver's claim, but refused to allow it participation in the funds then in the hands of the trustee. The District Judge says it should participate in that fund. Whether the practical effect of the referee's order may or may not result in the receiver getting anything on his alleged claim out of this estate is not a question for consideration.

Again quoting a portion of the referee's order "being of the opinion heretofore expressed as shown by the files and records herein that the creditors of Peter Thompson and those represented by L. H. Macomber as receiver should share equally and ratably", etc., it is quite apparent that as to any other fund that may come into the hands of the trustee, the receiver shall share in the same along with the bankrupt creditors, that is, each class of creditors shall receive the same percentage on their debt, but the creditors represented by the receiver having already received a large percentage, and having refused to account for or surrender the

same, are barred from this particular fund pending their willingness to comply with the referee's order.

SHOULD THE APPEAL HAVE BEEN TAKEN WITHIN TEN DAYS?

We think the District Judge was well within his rights in setting aside the order of Sept. 30, 1919.

Trustee's counsel confesses willingly that out of abundance of precaution he should have, perhaps, ascertained when the order, which had been prepared by opposing counsel, was presented to the Court for signature, and the date the same was signed if approved. On the other hand, he urges most strongly, that it was none the less the duty of opposing counsel, or someone, to notify him that the order had been signed, and the date thereof.

We believe it is a matter of which this Court will take judicial notice, viz., that the District Court is not in continuous session in Tacoma. Furthermore, that the Judge of this division is, for a major portion of his time, holding court elsewhere. Hence it is necessary, oftentimes, to wait his return, or to forward by mail papers intended for his signature. We mention this only to show that it does not necessarily follow that an order will be immediately signed by the Judge when being mailed to the clerk for presentation, and hence there should be an obligation on the part of someone—either counsel or the clerk—to notify the opposing counsel of the date of the actual signing of the order, or the instrument

in question. Counsel for appellee, in his letter to the clerk enclosing his proposed order, requests: "Kindly advise me when the order is signed." It can hardly be said that it would have been any infringement on the rules of propriety as followed by the profession and bar generally, for opposing counsel to have notified counsel for the trustee that his order had been signed on Sept. 30th, etc.—especially since the time for appeal, assuming the same must have been perfected within ten days—was very short. Instead, however, counsel waited until October 13th before so notifying him.

Immediately upon hearing that the order proposed by appellee had been actually signed, the trustee filed a petition for rehearing. This petition was filed in the best of good faith and is absolutely meritorious.

As pointed out in the petition for rehearing (pp. 73-75) at the time of the hearing and argument before the District Judge, the latter held that the recital of facts in the Findings made by the Superior Court for King County to the effect that the trustee of Peter Thompson, bankrupt, had appeared in that proceeding was binding and conclusive on him. While the trustee, on the other hand, maintained most strenuously that he had never filed any appearance in the King County proceedings, whereupon opposing counsel, counsel for appellee herein, made the statement that the trustee's attorney had entered into a stipulation concerning the proposed

hearing in the King County court, and counsel for the trustee not being aware at the time the statement was made in open court that any such stipulation, or any stipulation, had been made or entered thereto, caused to be prepared by the Clerk of the Superior Court for King County a certified transcript of the files of the proceedings in which the receiver had procured the order or "judgment" against the funds then in the hands of the trustee. An examination of these files, which are a part of the record in this case, discloses that there was filed with the clerk of the King County Court, Seattle, Washington, a proposed stipulation which had been prepared with a view of securing an extension of a few days for the hearing on the proposed call and assessment. The trustee herein had been notified by mail that a hearing would be held in the Superior Court of King County at a given date, but being unable to be present on that date, either in person or by counsel, the trustee, through his counsel, prepared the proposed stipulation. Opposing counsel, who being the same as now appears in this court, was unwilling to sign said stipulation looking to an extension of time. Instead of returning the same to the trustee's counsel, he filed the instrument without the knowledge of the trustee or his counsel in the County Clerk's office for King County, Washington, and even paid the appearance fee thereon. In passing, we think it is quite evident that appellee's counsel was not satisfied with the manner in which he sought to bring the trustee into the state court

proceedings, namely, by mailed notice, and evidently thought that by filing the instrument in question, with the signature of the attorney for the trustee appended thereto, the latter would then be forever estopped from questioning the subsequent proceedings.

The certified files, which are a part of the record in this Court, show absolutely the kind of appearance (?) made by the trustee. The foregoing was the basis for rehearing and was argued and presented in the utmost good faith.

The petition for rehearing (which had been filed on the 14th of October, 1919) came on in due course and without objection on the part of counsel to the consideration thereof by the Court, and was submitted to the Court for decision and the fact that in the judgment of the Court no sufficient reasons were advanced to overturn his previous conclusions, or that he arrived at the same conclusion as previously, does not affect the validity of the order made.

The statement of opposing counsel that the act of the District Court in vacating the order of September 30th was to circumvent the Statute and to extend or revive a lost right of appeal is without foundation. *The Court granted a rehearing.* It is true that the Court arrived at the same conclusion which he had arrived at on previous hearing. It would seem that if counsel for the receiver intended to question the jurisdiction of the Court to consider the petition because not filed within ten days after

the entry of the order complained of, he should have raised the question by motion to strike the petition, or some other appropriate procedure. We do not believe that this Court will question the act of the District Judge in setting aside the order of September 30th and in again considering the trustee's objection as raised by the petition for rehearing in question. We think that the receiver, Macomber, by not having moved against a consideration of the petition for rehearing, is now estopped to question the act of the District Court in considering the same. At all events we believe that the only question for consideration is whether or not the District Court had jurisdiction to grant a rehearing and set aside the order on a petition filed more than ten days after the entry of the original order. The District Judge specifically finds in his order of November 24th (p. 133), as follows:

> "On October 13, 1919, the said W. W. Keyes was reminded that said order had been signed and entered by this Court on September 30, 1919, and this was the first actual knowledge had by the trustee or his attorney of the signing and filing thereof. Whereupon the trustee promptly filed the petition to rehear and to vacate, above referred to.
>
> "The Court further finds that an appeal had at all times been contemplated by the trustee, to the Circuit Court of Appeals, in the event of an adverse decision by this Court, and that the delay in taking such an appeal within ten days after September 30, 1919, was not caused by the culpable neglect of the trustee, etc. . . .

"It is further ordered that the petition for rehearing be denied."

Opposing counsel at the top of page 9 of his brief states that the entry of the order of November 24th was "simply to circumvent the Statute, and to extend or revive the lost right of appeal." The fact that the Court granted the rehearing but arrived at the same conclusion that he had arrived at previously would, of necessity, compel the Court to enter the same order, namely, an order permitting the referee to participate in the fund in question. In other words, it can not be urged that because the District Judge arrived at the same conclusion as formerly, his act in making the order of November 24th was "simply to circumvent the Statute". If the petition for rehearing had been a "pretense", manifestly the Court would have refused to consider the same, and, furthermore, counsel had ample opportunity to object to a reconsideration of the claim on its merits as raised by the petition to rehear. This identical question has been before the courts, and it is generally conceded that the trial court is well within its jurisdiction in granting a rehearing even after the ten-day period has expired.

Counsel directs the Court's attention to *West vs. McLoughlin*, 162 Fed. 124, 20 A. B. R. 654. This case very much sustains the position of the District Court in granting a rehearing and setting aside the former order. We quote therefrom, as follows:

"The appellant proved and filed a claim for $5,000 for money had and received from him by the bankrupt. Objection to the claim was made by the trustee, and upon the testimony heard before the referee the latter disallowed it. On the 23d day of July, 1907, the District Court affirmed the order of the referee, and the judge, having at once left upon a vacation trip, was not, for over ten days, within reach of appellant's counsel, who desired to take steps for an appeal. No reason is disclosed by the record for not taking other available steps for that purpose; but on the 13th day of September, 1907, appellant filed a petition for a rehearing. The Court granted that relief, and after further discussion in a second opinion the district judge again and somewhat more at length stated his reasons for adhering to the judgment affirming the referee's order disallowing the claim. The order of the District Court again affirming the referee was entered on the 30th of October, 1907.

"The appellee has moved for the dismissal of the appeal. Section 25a of the bankruptcy act Act July 1, 1888, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432) provides (quotation of Statute omitted):

'One purpose which runs through the act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we can not accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the

Statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, *even after the expiration of ten days.* This court, in the case of *In re Ives,* 113 Fed. 911, 51 C. C. A. 541, so decided upon a kindred proposition and fully stated the reasons for the rule. The records show that it was not a mere purpose to evade Section 25a that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only re-examined the questions involved, but more elaborately stated his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him. Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied'."

Counsel also cites *In re Wright,* 96 Fed. 820, 3 A. B. R. 154. This was a decision of the District Court of Massachusetts, and we quote the entire opinion, which is as follows:

"In this matter the court rendered a decision July 21, 1899, and the decree was entered on that day. The questions involved were important, the sum of money involved was considerable, and an appeal by the unsuccessful party was expected. Owing to a series of mishaps, which it is not necessary to rehearse, no appeal was taken by the trustee within the ten days mentioned in Section 25a of the bank-

ruptcy act. The court is satisfied that the delay was not caused by the culpable neglect of the trustee or his counsel. As soon as might be after the expiration of the ten days, the trustee filed in this court a petition for a rehearing, avovedly with the object of regaining by means of a rehearing the right of appeal which he had lost by the expiration of time. The court is satisfied with its original decision upon the merits of the case, and will not grant a rehearing in order to give those merits further consideration. To grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appal, would be the employment of an unworthy fiction. The record should show the true purpose for which the rehearing was sought and granted. On the other hand, if it is within the power of this court to revive the petition's right of appeal by granting a rehearing expressly for that purpose, the court is disposed to take appropriate action to that end. The question presented, therefore, is this: Can the district court grant a motion for a rehearing filed after the expiration of ten days from the date of the decree involved? The question just put seems to be decided in favor of the court's jurisdiction in *Stickney vs. Wilt*, 23 Wall, 150, 164. In that case a party filed his petition in the circuit court for the review of a decree of the district court in bankruptcy. The circuit court decided in his favor, and the other party appealed to the Supreme Court, which decided that the proper remedy for an erroneous judgment of the district court concerning the matter in question was by appeal to the circuit court, and not by petition for review and revision. The supreme court therefore remanded the case to the circuit court with directions to dismiss the petition for review. The decision of the supreme court was ren-

dered after the time allowed for an appeal from the district court to the circuit court; but, in delivering the opinion of the Supreme Court, Mr. Justice Clifford said:

"'Unable to refer the appellee to any legal remedy as matter of right, under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the district court will grant a review of the decree rendered in that court if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the circuit court.'

"From this remark it seems to follow that the supreme court considered that the district court would be justified in granting a review of its own decree for the purpose of allowing that decree to be appealed from, although the application for review was presented after the time for appeal had expired. The trustee's petition for a rehearing, which may be treated as a petition for review, is granted as of this date. On October 10, 1899, let a decree be entered allowing proof of the claim of the county of Worcester as a debt entitled to priority."

Subsequently the case reached the Circuit Court of Appeals and entitled *In re Worcester County*, and reported in 102 Fed. 808. The position of the District Judge was sustained as shown by the following quotation taken from the opinion:

"The underlying questions involved in these three cases are the right of the county of Worcester to prove a claim in bankruptcy, and to have priority for the claim if allowed, all under

the bankruptcy act of July 1, 1898, c. 541 (30 Stat. 544). The referee allowed the claim, but refused it priority. On appeal to the district court, that court, on the 21st day of July, 1899, entered an order as follows: 'It is hereby ordered and decreed that the debt may be proved by the county any is entitled to priority, and that the decree of the referee be modified accordingly.' Derby, the trustee in bankruptcy, desired to appeal, but he failed to do so within the ten days limited by the statute for appeals. Thereupon, on the 30th day of August, 1899, he filed a petition for rehearing. It is apparent that the purpose was to revive the right of appeal. The court treated the petition for the rehearing as a petition for a review, and on the 4th day of October, 1899, granted it, and on the 10th entered an order as follows: 'It is hereby ordered and decreed that the proof of the county of Worcester be allowed as a debt entitled to priority.' It will be noticed that the order thus entered departed literally from that of the 21st day of July, but we assume that the second was intended to be substantially the same as the earlier one, and to have effect both to allow the proof and to establish its priority. Derby, as trustee, thereupon appealed, and his appeal is the subject-matter of *Derby, Trustee, vs. County of Worcester*. The grounds of his appeal are two: First, that the district court erred in allowing the proof; and, second, that it erred in allowing it as a debt entitled to priority.

"The order of July 21st was entered during the term of the district court which commenced on the fourth Tuesday of June, 1899, and the petition for rehearing was filed at the same term. The order granting the rehearing, however, was entered at the term commencing on the second Tuesday of September, 1899. Inas-

much as the petition was filed during the June term, and was not stricken out, but was heard and its merits acted on at the September term, it must be accepted that the petition was filed at the June term with the consent of the court, and that the court thus held its control over the proceeding. In *Andres vs. Timm*, 12 C. C. A. 77, 64 Fed. 149, decided by this Court, the facts were as follows: A petition, which we held to be, in substance, a petition for a rehearing, was seasonably filed in an equity cause at the October term of the circuit court for the district of Massachusetts. There was nothing in the case to show that the petition was brought to the attention of that court, until the succeeding May term, when it heard it on its merits and denied it. We held that the proceeding was effective, and that the time for appeal did not begin to run until the petition was denied. This decision was cited, without disapproval, in *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 679, 18 Sup. Ct. 786, 42 L. Ed. 1192. We relied on *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 34 L. Ed. 986, an examination of which will show that it fully supports the proposition we now make. Thus, it appears thoroughly settled by authority that, under the circumstances, the district court retained its control over the proceedings, and granted a rehearing and entered a new decree, with the same effect as though the whole had occurred during the June term. *During that term the court had, of course, entire control over the decree entered on July 21st, and might at any time vacate it and enter a new decree.* It is of no consequence whether the petition was regarded by the district court as a petition for a rehearing or for a review, as the power of the court in this particular is regardless of forms, and may be exercised even in a summary manner. A striking illustration

of this is found in *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211, where the court, after a mandate issued, recalled it and modified its judgment.

> "The district court therefore had power during the term at which the decree was entered to vacate it and enter a new decree, and retained this power over the case by permitting the filing of the petition for a rehearing, as we have already shown, so that the result is in all respects the same as though all the proceedings had occurred at the June term."

Again, in *In re Hudson Clothing Company*, 140 Fed. 50, the court says:

> "It is undoubtedly true also that the Court has a right to grant a rehearing for the purpose of allowing an appeal to be taken. This petition may fairly be held to present the question of a review."

In *In re Worcester County*, 102 Fed. 807, 42 C. C. A., 637, Judge Putnam, in speaking for the Circuit Court of Appeals, has said: "That it is of no consequence whether a petition is regarded by the court as a petition for rehearing or as a petition for review; that the court does not regard forms in this regard. In *In re Wright* (D. C.) 96 Fed. 820, Judge Lowell did grant a rehearing for the purpose of allowing an appeal to be taken."

Also in the case of *In re Ives*, 113 Fed. 912, the court discusses the question of jurisdiction as follows:

> "1. The trustee urges in this court that the remedy of the petitioners, if any, is by an ap-

peal from the order sustaining the demurrer, and that the 10 days provided for by appeal expired before the petition here was filed. Section 25 of the bankruptcy act of 1898 provides that appeals may be taken in bankruptcy proceedings to the circuit court of appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, and allowing or rejecting a debt or claim of $500 or over, and that such appeals shall be taken within 10 days after the judgments appealed from have been rendered. An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not referred to in this section, and is not a judgment from which an appeal will lie, within its purview. It rather comes within section 24, authorizing the Circuit Court of Appeals 'to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction,' which provides a summary mode of reviewing the orders of the bankruptcy courts upon questions of law on petitions filed in the appellate court by parties aggrieved. *Courier-Journal Job Printing Co. v. Schaffer-Meyer Brewing Co.*, 41 C. C. A. 614, 101 Fed. 699; *In re Seebold*, 45 C. C. A. 117, 105 Fed. 910; and the large number of cases in the note in *In re Eggert*, 43 C. C. A. 12-15.

"2. The petition shows that several terms of court intervened between the adjudication sought to be vacated and the filing of the petition, and it is urged that an adjudication in bankruptcy is under the control of the court only during the term at which it is made, and can be set aside or modified only during that term; that it, like all other judgments, passes beyond the power of the court when the term at which it was made closes, unless steps are taken during that term to vacate or correct it.

The Supreme Court of the United States has, in strong language, expressed this view in all cases coming within the principle of the cases it was considering when the expressions were made, and that view is not open to question. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013. But in section 2 the bankruptcy act seems to contemplate that from the filing of the petition to the closing of the estate the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered, and which have no terms. It provides that matters arising in a bankruptcy proceeding may be heard in vacation or term time, and orders allowing or disallowing claims may be reconsidered, closed estates reopened, and compositions and discharges set aside. It has been held by the Supreme Court that under the bankruptcy act of 1867 the district court, for all purposes of its bankrupcty jurisdiction, is always open, and has no separate terms; that the proceedings in a pending suit are, therefore, at all times open for reexamination upon application therefor in appropriate form, and that any order made in the progress of the case may be subsequently set aside and vacated upon proper showing, provided rights have not become vested under it which will be disturbed by its vacation; and it is held that application for such re-examination will not have the effect of a new suit, but of a proceeding in an old one. *Sandusky v. Bank*, 23 Wall, 289, 23 L. Ed. 155. This language used in reference to the bankruptcy act in *Re Lemon & Gale Co.* (C. C. A.) 112 Fed. 296. We are of the opinion, therefore, that the question presented by the petition was open, and the court below had power to determine it, although several terms of the district court had expired since the adjudication."

It is quite apparent, we believe, that the petition for rehearing or review as the case may be, in the instant case was filed with the best of good faith. If the actual records in the State Court did not sustain the recitals in the purported claim filed by the receiver Macomber, and since the recitals of said claim apparently were the controlling factor as to the conclusion reached by the District Judge, it was imperatively the duty of the trustee to call this state of affairs to the District Judge instead of appealing to this Court without so doing.

The District Court ruled against the contention of the trustee as to whether or not it was incumbent upon the clerk to furnish him a copy of order as contained in Equity Rule No. 4 of the Supreme Court. The case cited by counsel in his brief (In the matter of Stafford) is the only case so far as appellant has been able to ascertain in which this question was discussed. In passing, however, it will be noted that this was a district court decision and deals with a discharge in bankruptcy. The opinion of the court was rendered on September 1, 1915. No formal order of discharge was entered in pursuance of the opinion until a year afterwards, namely, September, 1916, when a *nunc pro tunc* order as of September 1, 1915, was entered. A petion to reopen the order was filed, the exact date of the filing of the petition not being given, but clearly more than a year after the opinion had been rendered. Such being the facts the petitioners were not in a position to appeal very strongly to the court.

ON THE MERITS.

There must be no misunderstanding on the facts: About eleven months after Peter Thompson was adjudicated a bankrupt, a certain creditor brought suit against a corporation in which Thompson was a stockholder and had a receiver appointed. Subsequently this receiver initiated a proceeding to collect on the stock subscription. Under the law of Washington, as has been sufficiently pointed out, it is a necessary prerequisite to establishing liability on a stock subscription, that a preliminary hearing be had, and in the event the Court is of the opinion that there is a basis warranting suit by the receiver, the latter is authorized to proceed accordingly. Opposing counsel states the rule on pages 40 and 41 of his brief. Appellee was not satisfied with getting the preliminary order but proceeded to procure from the trial judge a *decree*. This decree he now states is not subject to attack by the trustee in bankruptcy.

We have here not a judgment secured *prior* to bankruptcy, neither have we a judgment on a matter *initiated prior* to bankruptcy, and reduced to judgment after adjudication. It is a proceeding initiated in a state court *after* adjudication.

Sec. 62a (5) says under debts which may be proved: "founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's discharge, *less costs incurred and interests accrued after the filing*

of the petition and up to the time of entry of such judgments." In the present claim there is included $1000.00 as "expenses of administration". (p. 5).

We seriously question whether the state court could acquire jurisdiction to liquidate a claim against a bankrupt estate, regardless of the question of appearance or process. Once a bankruptcy court assumes jurisdiction, it assumes it for all purposes, and the jurisdiction is exclusive.

> *Virginia, etc., Co. vs. Olcott*, 197 Fed. 730; Collier (11th Ed.) pp. 28 *et seq.*

The entire proceeding of the state court is a part of the record in this case, certified copies of the same being sent down. This record speaks for itself. The "process", the appearance (?) of the trustee are all set forth. The stipulation (?) which counsel now says amounts to a general appearance is in the record. A proposed stipulation can not become anything until signed by all parties. Counsel does not deny that he was unwilling to enter into a stipulation, and hence refused to sign the document mailed to him. Had he signed it, and thus made it an instrument entitled to be filed, his argument about "general appearance" might merit consideration.

His reference to the statute, on page 38 of his brief, is beside the question. It is a very common practice "to appear" in an action thereby to prevent

a default and until some appropriate pleading can be prepared. As we have said, it might be argued with some force, that actually entering into a stipulation constitutes a *general* appearance, but certainly a mere *proposal* to enter into such a stipulation cannot be so considered.

To be sure, opposing counsel must have had considerable doubt as to his procedure, or else he would not have resorted to the extremity of secretly filing the instrument with appellant's signature attached, and paying the filing fee on the same.

On page 26 of his brief, appellee italicizes the recital as to the "additional issues orally made up between the parties", etc. Counsel well knows that there were no "issues orally made up", and neither will he deny that he presented and had signed the purported "decree" without having submitted the same to Peter Thompson or the trustee, or to their attorney, and in their absence.

The certified record of those proceedings shows no service of the proposed Findings and Decree, and no notice of presentation as required under the rules. However, we do not wish to be understood that anything we have said is in the nature of a criticism of the state court. Courts naturally rely on counsel and assume that no fact is recited not entitled to be recited.

We have examined the authorities cited by appellee and find that they deal with three classes of

cases: (a) judgments procured before bankruptcy, (b) judgments procured after bankruptcy, but initiated *prior* thereto, (c) suits by trustees to set aside preferences or to recover specific property. None of them deals with judgments procured on proceedings initiated *after* bankruptcy.

Appellee refers to the several Washington cases. He has confused the word *must* with *should*. The fact that a court finds at a preliminary hearing that so much money is necessary to pay the debts of the insolvent corporation and *should* be paid by the several stockholders does not mean that these same stockholders *must* pay. They may have any number of defenses. The question of set-off, counter claim, fraud, want of consideration, etc., are all open to them when they are brought into court in a plenary suit. Why does the Supreme Court in *Chamberlain vs. Piercy*, *Beddow vs. Huston*, *Rea vs. Eslick*, all cited by appeellee, *say that the receiver shall bring suit? Why doesn't the court direct that a judgment shall be entered in the receivership proceedings as was done in this case?*

Suppose Peter Thompson was not in bankruptcy, could a binding judgment have been entered against him under the show cause order in the receivership matter? Could *any* judgment have been entered against him in the receivership case?

Matter of Berlin Dye Works & Laundry Co., 34 A. B. R. 452, is a well considered opinion collecting a number of cases. A judgment had been pro-

cured in the Superior Court of California against the defendant, *prior* to bankrupty of the defendant. An appeal was prosecuted from said judgment, resulting in an affirmance of the same. During the pendency of the appeal defendant was adjudged a bankrupt. The judgment was then filed in the bankruptcy proceedings and *disallowed*, because it was not absolutely owing at the time of filing petition in bankruptcy. The opinion says: *"It was not res adjudicata until it had become a final judgment* (p. 460). On the other hand, if a claim is reduced to judgment before the filing of the bankruptcy petition it may be proved *as a judgment though not, if not reduced to judgment until after the filing of the petition"* (our italics), citing *In re Crescent Lumber Co.*, 154 Fed. 724; 19 A. B. R. 112.

In brief a judgment procured after bankruptcy ensues cannot be *res adjudicata.*

We respectfully refer the Court to the *Berlin* case. While the opinion was written by the referee, it is well considered and ably presented.

See, also,

Cotting vs. Hopper, Lewis & Co., 34 A. B. R. 23.

Judge Lurton in the case of *In re Neff* (6th Cir.), 157 Fed. 57; 19 A. B. R. 23, says: "The status of a claim must depend upon its provability at the time the bankruptcy petition was filed. At that time it must come within the definition of sec. 63

of the Bankruptcy Act; *it cannot be benefited by its status at a later date*" (our italics).

In *In re Pettingell & Co.*, 137 Fed. 840; 14 A. B. R. 728 (D. C. Mass.), it is said, "The provability of a claim under the Bankruptcy Act of 1898 depends upon its status at the time the petition in bankruptcy is filed; if then provable within the definition of sec. 63 it may be proved; otherwise not." To the same effect see *Slocum vs. Soliday* (1st Cir.), 25 A. B. R. 460; 183 Fed. 410.

In the matter of *Berlin, etc., Co., supra*, the opinion, among other things, says in speaking of claims entitled to be proved:

> "To be absolutely owing it must be owing beyond peradventure, positively and unconditionally. No modified definition can be given to the expression in the statute of 'absolutely owing'. It is futile to argue that the claim is a liquidated claim by reason of judgment entered in the Superior Court of Los Angeles County. It could only be liquidated when that judgment became a final judgment. It is not such a claim as can be liquidated in bankruptcy. Clause 'b' of sec. 63 to the effect that 'unliquidated claims against a bankrupt may pursuant to application to the court be liquidated in such manner as it shall direct', does not enlarge the class of provable debts, but simply provides for reducing into form, in which they may be proved those debts which, if liquidated, could be proved, under clause 'a', as being either judgment debts, contract debts, taxes or costs. 1st Rem. on Bankruptcy, sec. 705, and cases cited."

We think that the above is necessarily the rule and not subject to dispute. If it were permitted that claimants might go into foreign jurisdictions, the state court of Washington in this instance, and there secure judgments on proceedings initiated after the Bankruptcy Court has assumed jurisdiction, and then set up these judgments as *res adjudicata*, the doors would be open for all sorts of fraud. For example, the bankrupt might confess judgment on a doubtful claim or might not put up a meritorious defense. He would be little interested in the outcome as long as his bankrupt estate would be called upon to respond, and indeed if it were a claim of such a nature that he would not be relieved of liability by reason of the bankruptcy proceedings he would be all the more anxious that claimant obtain a judgment, which under appellee's contention would preclude further investigation.

II.

Assuming the findings as set forth in the claim filed by the receiver are correct, the sole question presented concretely is this: Peter Thompson at the time of his incorporation owed a number of creditors including creditors now represented by the trustee, and also creditors who had furnished merchandise to his Seattle store. However, these creditors had no lien of any kind and the merchandise which Thompson then had in his Seattle store was his absolutely to do whatsoever he wished with. He concluded to turn it over to the corporation in pay-

ment of his stock subscription together with good-will, etc.

Our contention is that there is no such thing as Thompson's "equity" as counsel refers to. If these creditors had had a mortgage or some other form of security, then of course he could convey only his equity. The creditors in question had extended credit to Thompson as an individual and he owed them the balances of their respective accounts. We cannot see that the fact that the corporation may or may not have assumed Thompson's indebtedness alters the situation.

Certainly those creditors did not release Thompson, and it is an interesting query as to why these creditors did not file their claims direct in this proceeding.

We do not want to pursue the discussion in this matter to any length because of our belief that the other objections will dispose of the case. In passing, however, we heartily agree with the doctrine announced in *Lantz vs. Moeller*, 76 Wash. 429—in fact, the writer was the attorney for the respondent in that proceeding, and urged the adoption of the views as set forth in the court's opinion.

III AND IV.

Appellee bases his answer to objections III and IV on the fiindings made by the state court. He says, at the bottom of page 53, "The finding of the court below that claims aggregating $7500.00 constituted a true, just and valid indebtedness against

Peter Thompson, a corporation, precluded any further inquiry on that subject in the Bankruptcy Court."

What we have already said in discussing objection I is applicable here, and we will not repeat the same.

We gather from appellee's argument that there would be merit in the trustee's objections III and IV except for the fact that he is precluded from raising those objections on account of the finding and decree of the state court.

V AND VI.

We do not believe it is necessary to enter into a further discussion of objections V and VI. Appellee has brought forth no new cases, and we content ourselves with the discussion in our opening brief. We will cite, however, without comment, the following:

In re Pettingell, etc., Co., 14 A. B. R. 728;

In re Bingham, 2 A. B. R. 223;

In re Burka, 5 A. B. R. 12;

In re Swift, 7 A. B. R. 347.

It is respectfully submitted that the controversy herein involved is properly before this Court and that the decision of the District Court should be reversed and appellee denied participation in these funds.

W. W. KEYES,
Attorney for Appellant-Petitioner.

No. 3433

United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of PETER THOMPSON, Bankrupt.
R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt,

Appellant,

vs.

L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLEE

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REPLY BRIEF OF APPELLEE

On Motion To Dismiss Petition For Review.

Under the above heading opposing counsel attempts to defend his petition for revision against our motion to dismiss by deliberately misstating the nature of the judgment he has brought to this court for review. To that end he says on page 4 of his reply brief:

> "Both the referee and the District Judge have allowed the claim, the former denying participation in certain funds realized from the merchan-

> dise assets, the latter holding that the claim should be given the same rank as other unsecured claims. It is not a question of allowance or rejection of a claim or debt. It is a question of rank of a claim that has arisen in the course of the bankruptcy proceedings."

The statement that the referee allowed the claim, merely, "denying participation in certain funds" is untrue.

In quoting from the record to support his contention he has repeated, on page 7 of his reply brief, "That the question now before this court is not one of allowance or rejection of a claim, but one of classification."

Opposing counsel has been guilty of deception in the following particulars:

On page 2 of his reply brief he pretends to set forth the last order of the referee on the subject of this claim, and on page 3 he says: "The last order made by the referee (pp. 129-30) expressly holds that the claim 'is in proper form and is entitled to be filed as a claim in said estate.' "

The deception here lies in the pretense that the order as set forth on page 2 is the *complete* order. The deception lies further in the taking of the last sentence of this order as found in the record, deliberately converting a coma into a period and closing the sentence at that point as if that concluded the order, suppressing the balance of the sentence following the coma.

The deception lies also in the pretense, on page 3

and on page 6, that the preliminary recital in the emasculated order reading "I find that the claim of said L. H. Macomber, as receiver, is in proper form and is entitled to be field as a claim in said estate" constituted the allowance of the claim by the referee.

The deception continues on page 3 where opposing counsel argues: "It follows, therefore, that the question to be reviewed is the same question certified to the District Judge by the referee, viz., 'Whether or not the claim of L. H. Macomber, receiver, should be allowed . . . *to participate in the funds now in the hands* of the trustees. (p. 71).' "

Here is the proof: Taking the last order of the referee governing the allowance of the claim in controversy as quoted on page 3 of counsel's reply brief, we find the order is completed by a sentence of which the last word is "estate", concluded by a period. Turning to page 129 of the record, an examination of this same order develops that in the *middle* of the last line is found this same word, "estate", with a comma after it, not a period, and following the comma these lines complete the order, "*and the claim of the said L. H. Macomber is therefore disallowed, to which ruling the said receiver by and through his attorney, L. M. Stern, duly excepts, and his exceptions are allowed.*"

The nerve of opposing counsel is monumental, but even he would have found it embarrassing to print the true conclusion of this order, on page 3 of his brief, and to follow on page 4 with his contention that by this order the referee *allowed* the claim,

merely, "denying participation in certain funds."

Further sins of omission are found in the quotation on page 3 from the certificate of review of the foregoing order made by the referee to the District Judge. Counsel says that in this certificate the referee certified the question to be reviewed in the following words: "Whether or not the claim of L. H. Macomber, receiver should be allowed . . . *to participate in the funds now in the hands of the hands of the trustees,* (p. 71)."

Counsel's handiwork is very clever. Read as a complete sentence without reference to the text omitted or the context there may be room for contention that the question which the referee had decided and which the District Judge must decide was not a dispute over the debt or claim itself, but a question of rank or priority of the claim by reason of its character.

Turning to the certificate itself (Record p. 71) the following is found to be the true quotation, the part italicised being the part that opposing counsel preferred to represent by asterisks in his brief:

> "The question presented on this review is: Whether or not the claim of L. H. Macomber, receiver, should be allowed *as a proper claim against this estate and* to participate in the fund now in the hands of the trustee."

We will concede, as opposing counsel argues on page 3 of his brief, that the question brought here for review is "the same question certified to the District Judge by the referee"; but that question,

and the real question decided by the referee and certified by him to the District Judge, is found, not in the garbled quotation presented by opposing counsel in his brief, but it is found in that portion of the referee's language so carefully suppressed from counsel's quotation.

By the order itself, as shown above, the referee ruled that "the claim of L. H. Macomber, receiver, is therefore disallowed", and by his certificate to the District Judge, which accompanied this ruling, the referee advised that "the question presented on this review" was whether the claim "should be allowed *as a proper claim against this estate.*"

Thus we see that the first and the last ruling of the referee was that the claim should *not* "be allowed as a proper claim against this estate."

Never having been allowed as a claim *against the estate*, there was not, and could not have been, any occasion for any decision on the question of rank or classification.

Opposing counsel also attempts deception when having suppressed from his quotation of the referee's order the concluding recital, "and the claim of said L. H. Macomber is therefore disallowed," he argues on page 7 of his brief that the referee had allowed the claim by a preliminary recital in that same order reading, "I find that the claim of L. H. Macomber, as receiver, is in proper form, and is entitled to be field as a clam against said estate.

If counsel is not trying to hoodwink us in his contention that permitting a claim to be *filed* is the

same as *allowing* the same, he betrays a gross ignorance and shows himself to be disqualified to act as attorney for a trustee in bankruptcy. Knowing him to be a specialist of many years' practice in the bankruptcy courts we feel we are making ourselves ridiculous when we enter upon a discussion of a proposition so elementary as, that the *filing* of a claim is one thing, and the *allowance* quite a different step; and yet we must go on to point that under Sec. 57-c of the Bankruptcy Act claims may be proved or filed "for the purpose of allowance." After being duly proved and filed according to the farmality required by the Act, the court may then, under the authority of Sec. 57-d, *allow or* disallow the claim.

As pointed out by Collier on Bankruptcy (11th Ed.) 781, "The proof of a claim is one thing, its allowance by the court is quite a different step. When the act refers to the proof of a claim it means the deposition or statement of the creditor. When it refers to its acceptance by the court, it uses the word allowed or allowance. The distinction between proof and allowance is much the same as that between evidence and judgment. Before a claim can be regarded as proven the written proof called for by Sec. 57-n must at least have been filed or lodged with the court or some officer thereof."

After all, opposing counsel's argument as to the nature of the controversy brought here for review by the petition, is beside the mark. Under the law, appeals are brought and reviews sought, not from

incidental orders or stray remarks made by the referees in their certificates to the reviewing judge. Final decisions of the District Judge alone form the basis of a revisory petition or appeal to this Court, and the nature of the controversy can only be determined by reference to the petition for review and by an examination of the order alleged in such petition to have been erroneous, the ground of error set forth and the prayer for relief. Does this controversy involve merely the rank of the claim and not the allowance of the claim or debt itself? Has the nature of the controversy changed between the time of filing the petition for review and opposing counsel's argument against our motion to dismiss?

Let us examine opposing counsel's petition for revision. (Record pp. 44-57). After some preliminary recitals of the character of the claim as proven, the petitioner alleges that the trustee's objections were overruled, "finally culminating in the order of the said District Judge made and entered on the 24th day of November, 1919, directing that the claim of said L. H. Macomber should be filed and allowed in the above entitled estate." (Record, 53),

The petition then recites that this order was erroneous, and specifies six grounds designated by letters A to F. Each of these grounds concludes with the recital "That the District Court committed error in not disallowing the claim of the said Macomber, for the reasons above stated."

The concluding prayer of the petition for revision reads, (Record p. 57):

> "Wherefore, your petitioner feeling aggrieved because of the entry of the order of the 14th day of July, 1919, and the further order of the 24th day of November, 1919, asks that the same may be revised in matter of law by your Honorable Court as provided in Section 24-b of the Bankruptcy Law of 1898, and the rules and practice in such cases provided."

The order of July 14th, 1919, (improperly recited May 14, 1919, in Record p. 39), made by the District Judge, struck each and every one of the objections of the trustee, reversed the decision of the referee with respect to said objections and sent the matter back to the referee to make such order of "allowance of said claim as shall be consistent with this order."

The order of November 24, 1919, (Record p. 41), which the petition for revision prays be reviewed, is of course the final and real order brought to this Court for review. The substance of that order, the meat of the whole controversy, the real judgment which opposing counsel seeks to reverse, is found in the one sentence: (Record p. 43) "Ordered, that the claim of L. H. Macomber, as receiver, be and the same is hereby allowed as of the date of the entry hereof."

Is there the slightest suggestion in either the order of July 14 or of November 24, which are made the subject of the petition for revision, that the question of rank or classification was the issue

pleaded, argued or decided? Were the exhaustive objections of the trustee to the allowance of the claim based on the question of rank, or on the merit of the indebtedness as a whole?

This is answered by counsel's own statement on Page 4 of his reply brief, "That the trustee at all times insisted that the claim should be denied participation in any of the funds of the estate, regardless of the source of the funds."

And since both the petition for revision and the petition for appeal seek to bring the same subject matter to this Court for review,—the trustee pursuing both methods because he was not certain which was the proper course—it becomes pertinent to refer to his petition on appeal, and to learn therefrom what opposing counsel designates as the real issue in this litigation. On page 78 of the record is found his petition on appeal, wherein he sets forth that the court on the 24th day of November, 1919, "entered an order in said proceedings allowing the claim of one L. H. Macomber, as receiver, in the sum of $8500, as a general claim against the above entitled bankrupt's estate, and that in the entirety of said order, or that part thereof allowing said claim, certain errors were committed to the prejudice of the trustee herein."

And in the concluding paragraph of the assignment of errors accompanying his petition on appeal, opposing counsel recites; (Record, p. 85):

> "That the Court erred in directing that the said claim should be allowed as shown by its

> order of November 24, 1919. Wherefore said trustee of the above-named bankrupt prays that the said decision and judgment order be reversed, and that the District Judge may be directed to enter a decree and judgment expunging said claim of the said L. H. Macomber and disallowing the same in its entirety."

In his brief, styled Appellant's Brief, opposing counsel makes the following opening statement of the nature of the controversy before the Court:

> "L. H. Macomber as receiver of the Peter Thompson Company, a corporation, is seeking to have allowed a claim of approximately $8500.00 against the estate of Peter Thompson, an individual, growing out of an alleged liability on the Peter Thompson stock subscription. The claim has been allowed by the Disdrict Judge (pp. 41-43)."

Let us also look at counsel's original brief on petition for revision. It contains 39 pages. His statement of the case says nothing on the subject of rank or classification of the claim. The concluding paragraph of thise statement simply tells of the final order of Nov. 24, 1919, allowing the claim (p. 2), and the first paragraph of the argument (p. 3) reads as follows:

> "It was the contention of the trustee below, and it is here, that the claim of said Macomber is not entitled to participate in the estate of the bankrupt for six different reasons, (pp. 120-6)."

On page 4 of his original brief and argument, counsel points out that "the rulings of the District Court complained of are set forth in the petition for revision, and numbered A to F inclusive."

We have heretofore shown that the errors claimed in the petition for revision and lettered A to F involved only the merit of the claim itself, and made no mention whatsoever of the question of rank or classification.

Counsel's whole brief of 39 pages is an exhaustive argument in support of his six separate objections to the claim, each of which objections, as we have said, goes to the allowance of the claim or debt itself, and not to the matter of rank or classification. We have read the petitioner's brief several times and cannot find the slightest reference to the question of rank or classification. In fact, we feel sure that not even the words "rank" or "classification" appear in the course of the entire brief.

In short, we state it as absolutely a fact, that this question of rank or classification was never an issue in the entire history of this case. It was never raised in the pleadings. It was never argued by counsel or considered either by the referee or the District Judge. It is not even remotely referred to in any of the orders sought to be reviewed, or in the petition for revision or in the brief of the peitioner.

Paraphrasing opposing counsel's argument on page 4 of his reply brief, we say of the controversy here: "It is a question of the allowance or rejection of a claim or debt. It is *not* a question of rank of a

claim that has arisen in the course of the bankruptcy proceeding."

We take no issue with Judge Lurton's opinion In re Mueller, 135 Fed. 711, quoted on page 6 of the reply brief, holding that a petition for revision will lie when "the debt or claim is not disputed, and the only question sought to be reviewed is one of rank, or priority of the claim by reason of its character."

Nor do we take issue with any of the authorities cited on this same proposition. Our only reply is that the *debt or claim* in the case at bar is in dispute, and the question of rank is *not* "the only question sought to be reviewed."

In passing, we might remark that the converse of the rule announced by Judge Lurton is also true, viz., that when the question of the rank or priority of the claim by reason of its character is not the only question to be reviewed, *but the debt itself is also disputed*, appeal under Sec. 25-a is the proper method in determining the whole controversy. See Remington on Bankruptcy (2nd Ed.), Sec. 2901 and cases thereunder cited.

On Motion To Dismiss The Appeal.

We find it difficult to follow opposing counsel's argument on the issues raised by our motion to dismiss. Like the ubiquitous flea he will not stay "put," but hops from one issue to another. In answer to our motion to dismiss the appeal because taken too late, he now argues, on page 8 of his reply brief, that this controversy is appealable under Sec. 24-a; that it is reviewable under Sec. 24-b; and that it is appealable under Sec. 25-a.

Having vigorously contended that the petition for revision under 24-b was the proper method of review, he now seems to argue that this matter may properly come before this Court by appeal under 24-a.

But this is not "a controversy arising in bankruptcy proceedings," within the province of Sec. 24-a. That section refers only to controversies *outside* of bankruptcy proceedings, as a suit between the trustee and an adverse claimant. When the subject matter and object of the proceedings are within the power to make a summary order, it is a proceeding *in* bankruptcy proper, and not arising outside of the bankruptcy proceedings, and hence reviewable either under Sec. 24-b or appealable under Sec. 25-a, but not under 24-a.

The distinction is pointed out in Collier on Bankruptcy, (11th Ed. page 563):

> "(2) Controversies Arising in Bankruptcy Proceedings.—The words "controversies in bankruptcy proceedings" in subsection *a* of this

section, and the words "in bankruptcy proceedings" in the next section refer to different classes of cases; the former referring only to controversies outside of the bankruptcy proceeding proper, as suits between the trustee and adverse claimants. Nothing can be regarded as a "controversy arising in bankruptcy proceedings" within the purview of subsection *a* where the subject matter and object of the proceedings are within the power to make a summary order; certainly this is true where plenary action is not sought. As stated by the Supreme Court: "Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect to which special provision thereof was required, while Sec. 24-a relates to controversies arising in bankruptcy proceedings in the exercise of the jurisdiction vested in them at law and in equity by Sec. 2, to settle the estates of bankrupts, and to determine controversies in relation thereto." Controversies arising in the course of bankruptcy proceedings involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the trustee or receiver, or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate

to be distributed ultimately among general creditors. As where a controversy arises in respect to the claim of an adverse claimant in respect to a fund in the hands of the trustee as a result of a suit in the State court to recover property conveyed by the bankrupt in fraud of his creditors, it is a controversy arising in bankruptcy and is appealable under subsection *a* of this section. Such orders and decrees as are in the nature of independent suits and controversies, arising in the course of bankruptcy proceedings are reviewable on appeal or writ of error, as the case may be, under subsection *a* of this section.

"(4) Distinction Between Controversies Arising in Bankruptcy Proceedings and Bankruptcy Proceedings.—There is a clear distinction between such controversies and "proceedings in bankruptcy", within the meaning of section 25-a; the latter, broadly speaking, covering questions between the alleged bankrupt and his creditors as such, commencing with the filing of the petition, ending with the discharge and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, proof and allowance of claims, and other similar matters to be disposed of summarily, all of which naturally occur in the settlement of the estate. The great number of authorities upon this branch of bankruptcy practice and the conflict between

> them has given rise to endless confusion, and it is some times difficult to determine within which class a particular order of the bankruptcy court may fall. Each case will necessarily be determined by its own facts, and in each the important consideration is the object and character of the proceeding sought to be reviewed."

In the course of his argument counsel again distorts the record when he says, on page 17 of his brief: "As pointed out heretofore, we are not now concerned with the question of a rejection or allowance of a claim of $500.00 and over. The referee has allowed the receiver's claim, but refused to allow it participation in the funds then in the hands of the trustee."

As we have shown in previous arguments, the referee did not allow the claim, but disallowed it by the terms of that portion of his order which opposing counsel deliberately suppressed because it would show the disallowance.

This is a controversy over an order made in the bankruptcy proceeding proper. It involves a claim of over $500, duly filed and proven and allowed by the District Judge. The order was made in a summary proceeding in the course of the settlment of the estate. The relief sought by the trustee in this Court and the nature of the controversy can not be better shown than by reference to the concluding prayer of the trustee's petition for appeal, wherein he prays the Court to reverse the judgment of the District Court and to direct him to "enter a decree

and judgment expunging said claim of said L. H. Macomber and disallow the same in its entirety." (Record p. 85). Such a controversy cannot be brought here by appeal under Sec. 24-a, and the very cases cited by opposing counsel support our position.

In re Doran, cited on page 14 of the reply brief, as "not unlike the present controversy", involved a controversy in which the claim for the debt itself was never in dispute, but a lien right under the claim, only, was disputed, and the decision under the claim of *lien* was held to be reviewable in the Circuit Court by appeal under Sec. 24-a. And the ground for this decision was that *the claim itself being allowed*, no appeal under Sec. 25-a would lie, but, said the Court, had the debt been disputed, the only method of review of the debt itself, as well as incidental questions of its right to priority, in the Circuit Court, would have been by appeal under Sec. 25-a.

In re Dressler Producing Co., quoted at length on page 15 of counsel's brief, expressly holds that the "allowances of claims" coming under the head of bankruptcy proceedings proper, in the course of settlement of estates, is reviewable by appeal under Sec. 25-a, and is not an controversy arising in bankruptcy appealable only under Sec. 24-a.

Furthermore, we fail to find that any attempt was ever made by opposing counsel to bring this matter to this Court by appeal under Sec. 24-a. As stated by him on page 2 of Appellant's Brief, "the trustee

has both appealed and filed a petition for revision under Sec. 24-b of the Bankruptcy Act of 1898." In other words, he has brought this matter to this Court in two ways only, one by petition for revision under 24-b, and the other by appeal under 25-a, which latter appeal was taken within ten days after the order of Nov. 24, 1919, which opposing counsel contends to be the final and valid order of allowance of the claim.

This propostion that he has properly come into this Court to review the order of Nov. 24th under the provisions of Sec. 24-a is an after-thought on the part of counsel. He never contemplated such appeal when he prepared his record and did not take an appeal under that section of the Act. He is in this Court, as we have pointed out, and as he himself has always heretofore contended, merely upon his petition for revision and upon his appeal under Sec. 25-a.

Should The Appeal Have Been Taken Within Ten Days.

Here again opposing counsel pursues his policy of misrepresentation. On page 21 he says, "*The Court granted a rehearing.*" In making that statement he has reference to his petition for rehearing of the order of Sept. 30, 1919, allowing the claim. And on page 23 he again says, "the fact that the Court granted the rehearing . . . " And later, on the same page, he argues that "if the petition for rehearing had been a 'pretense' the Court would

have refused to consider the same," which, of course, is again an insinuation that the Court acted favorably on his petition for re-hearing. But on the very same pages on which counsel made three audacious statements, to-wit.: on pages 22 and 23 of his brief, he has caused to be reproduced the order of Nov. 24, 1919, by which the court disposed of his petition for rehearing, and we find therein the following conclusion to the order: *"It is further ordered that the petition for rehearing be denied."*

Does the word denied mean granted? That is certainly the way opposing counsel defines it.

As we have shown, the Court by its order of Nov. 24th absolutely and unqualifiedly denied the petition for rehearing. Such being the case, what is the use of the lengthy citations made by opposing counsel on the proposition that a District Judge has a right to grant a petition for rehearing which was filed in good faith and seasonably, and that the time for appeal begins to run from the time judgment was rendered after upon the petition for rehearing?

The rehearing on the merits having been denied, the sole basis for vacating the order of Sept. 30th was not to re-consider the subject on its merits, but, as frankly stated by the Court in its order, the original order of Sept. 30th was vacated in order to relieve the trustee of the consequences of his neglect to appeal from that order within ten days.

It is questionable whether the Court had the right to vacate the order after ten days to reconsider the merits of the claim. There may be authority found

both ways on this point, but there is no question, and no authority has been cited by opposing counsel, that the Court below had the right to indirectly enlarge the statutory time for appeal by vacating the final order after ten days, and re-enter a new order to precisely the same effect, in order to give the losing party ten days from the last order in which to appeal. If the Court can do this once, it can do it several times, extending the statutory period of ten days to any limit within the pleasure of the Court.

Further discussion on this point would be a waste of time. We rest the matter on our argument in our original brief.

On The Merits.

We are not sure that he have the right to reply to this part of opposing counsel's brief. But in any event wo do not find anything that merits any serious consideration.

We deny his statement on page 35 of the reply brief, that the entire record of the State Court is a part of the record in this case. Only such part of that record as was of record in the Court below when the claim was filed and when the objections thereto were considered, is properly a part of the record here.

It was not until Oct. 2, 1919, that counsel filed in the Court below an affidavit to which was attached as an exhibit certain proceedings of the State court,

to which he now takes exception. (Record p. 62).

This claim in controversy had been litigated and allowed over the objection of the trustee's counsel long before the affidavit and exhibits above referred to had been filed. Not having urged these alleged errors in the record of the State court, seasonably in the Court below, he cannot now urge them here.

The questions of the appearance by the trustee and the nature of the issues tried out by the State court in the receivership case are concluded by the certified record of the State court which was attached to the proof of claim, and mere denials of this record by counsel in his reply brief of the truth of these recitals, and challenges on his part that claimant's counsel deny this or that statement, only show the extreme to which he is driven in defending his position.

This case must be decided in this Court upon the same record of the State court, which was before the Court below at the time it made its final order of Sept. 30, 1919, allowing the claim. Any attempt to contradict that record by filings or objections made subsequent to Sept. 30, 1919, either in the Court below or here, cannot be entertained.

LEOPOLD M. STERN,
Attorney for Appellee.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of PETER THOMPSON, Bankrupt. R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt, *Petitioner,* —vs.— L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a Corporation, *Respondent,*	No. 3433

PETITION FOR REVISION

PETITIONER'S BRIEF

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PETITION FOR REVISION

STATEMENT OF THE CASE.

Peter Thompson, bankrupt herein, filed his voluntary petition in the District Court of the United States for the Western District of Washington and was duly adjudicated in April, 1917.

On April 2, 1918, one L. H. Macomber as receiver of the Peter Thompson Company, a corporation, filed in the bankruptcy proceedings a claim based

upon an alleged liability growing out of the subscription of Peter Thompson to the capital stock of the Peter Thompson Company, which had been found by the Superior Court of King County, Washington, to be "approximately $8,500.00". The trustee interposed certain objections (pp. 95-96). These objections were treated in the nature of a demurrer and sustained by the Referee (pp. 105-108). On a review of the Referee's decision by the District Court the Honorable Referee was overruled (pp. 113-19), the District Judge ordering "that the order of the Referee sustaining the objections treated as a demurrer interposed by the trustee", is referred back to the Referee for further proceedings not inconsistent with this order, etc.

The trustee thereupon, under the assumption that he would be entitled to contest the claim of the said Macomber upon its merits, by taking of testimony, etc., interposed further objections (pp. 121-126). Thereupon the said Macomber moved to strike all of the objections, numbered 1 to 6, inclusive (pp. 126-127). This motion was denied by the Referee (p. 128), and upon review to the District Court the Honorable Referee was again reversed, the District Judge making the following order: "The motion of the claimant, L. H. Macomber, to strike each and every one of the grounds of objection, set forth by the trustee, having been considered separately upon the merits of said respective grounds, said motion of claimant was sus-

tained and the ruling and the decision of the Referee in respect thereto was reversed" (pp. 130-131).

Subsequently thereto the District Judge made an order directing that the claim of said Macomber as receiver be allowed as filed (pp. 132-134).

ARGUMENT.

It was the contention of the trustee below, and it is here, that the claim of said Macomber is not entitled to participate in the estate of the bankrupt for six different reasons (pp. 120-6).

It will be observed that the trustee at no time or place has had the opportunity to contest the claim of the said Macomber on its merits. His objections in the first instance were treated as a demurrer, and as such were overruled by the District Court. When the trustee interposed further objections involving questions of fact a motion to strike the same was interposed by the attorney for the receiver, and an order was made by the District Judge striking each and every one of them. No opinion was filed by the District Judge, but the motion to strike was sustained on the ground of

(a) The decision of the District Judge on the demurrer that had been interposed previously; and

(b) On the assumption that the findings and decree of the Superior Court of King County were binding and conclusive.

It will be seen, therefore, that there is involved herein questions of law only.

The rulings of the District Court complained of are set forth in the Petition for Revision (pp. 143-7) and numbered (a) to (f), inclusive. We will discuss them in order.

I.

The claim appears to be based upon an order made by the Superior Court Judge of King County, Washington, on the 23d day of March, 1918. This is entitled, "Order Appointing Time for Hearing Petition for Call and Assessment" (p. 122). The making of such an order is in conformity with the practice and law of Washington and, as we understand it, in conformity with the law and practice of most of the States of the Union. It is fundamental and well established that a receiver of an insolvent corporation may apply to the court for an order directing stockholders to pay their unpaid subscriptions where there is a *prima facie* liability, and that in the event certain stockholders do not pay or do not respond to the order of court the receiver may be further authorized to institute an action to compel payment. It will be observed by reference to the claim of the said Macomber that the Superior Court Judge (pp. 96-103) undertook to make Findings of Fact, Conclusions of Law, and a Decree. No process of any kind was issued other than that contained in the order of March 23, 1918, which is as follows: "Ordered that a copy of the foregoing order and a copy of the Petition upon which it is based be served upon said subscribers personally and also upon R. D.

Simpson as Trustee of Peter Thompson, Bankrupt; or if they cannot be found in King County, Washington, that a copy of said order be mailed by registered mail to the subscribers and to the said R. D. Simpson as trustee of Peter Thompson, Bankrupt, to their last known addresses as specified in the Petition".

In the absence of the trustee the order, making call and assessment, etc. (pp. 137-143), was presented to the Superior Court Judge. It will be noted that the court recites, "R. D. Simpson as Trustee of Peter Thompson *Company*, Bankrupt, appearing in the action as appears by the files and records herein but not appearing at this hearing". Of course R. D. Simpson at no time has ever been trustee of Peter Thompson *Company*, the latter being a corporation and in the hands of L. H. Macomber as receiver. The certified copy of the case of *Alex. Kobrinetz et al. vs. Peter Thompson Company*, of the Superior Court of King County, Washington, discloses a proposed stipulation signed by R. D. Simpson as trustee looking to an extension of time for hearing on the order of March 23, 1918, referred to above. In this connection reference is made to the affidavit of W. W. Keyes (pp. 151-152), from which it appears that he prepared a stipulation looking to an extension of time for hearing upon the "Order Making Assessment", and forwarded it to the attorney for the receiver. The latter, however, being unwilling to consent to such a continuance refused to sign the stipulation, and,

instead of returning it, filed the same with the Superior Court of King County. This was done without the knowledge of the said R. D. Simpson or his attorney. Based upon this unwarranted act of the attorney for the said Macomber the Superior Court of King County inserted in its findings, "R. D. Simpson as Trustee of Peter Thompson Company, Bankrupt, appearing in the action as appears in the files and records but not appearing at this hearing".

We submit that it is fundamental and needs no citation of authority that a binding and conclusive judgment cannot be entered against a person except under statutory process. In the State of Washington it is based upon a Summons and Complaint. *Service* may be waived by appearance, but in order to get the person under the jurisdiction of the court so that a final judgment may be entered it is necessary to issue the legal process provided by the statute, which in the State of Washington is the Summons, so that if it may be considered for the argument's sake that R. D. Simpson as Trustee of Peter Thompson, Individual, voluntarily appeared at the hearing before the Superior Judge in King County, he could not be bound to any greater extent than that contemplated in the Petition and Order of March 23, 1918, which was simply appointing a time for hearing petition "*for call and assssement*". Any order made by the Superior Judge other than directing the receiver to demand payment, and in the event of refusal to institute

suit against those apparently liable on their stock subscription, would be absolutely void. However, no appearance was made by the Trustee in this proceeding, and it seems shocking that a contention is made that a binding and conclusive judgment can be entered as to him by simply writing him a letter that a hearing will be had in a certain court on a petition for "call and assessment" against certain stockholders, one of which happens to be in bankruptcy.

> "No conclusive effect can be given to a judgment which is absolutely void, whether its invalidity results from a want of jurisdiction over the parties or over the subject matter of the controversy, or from a want of authority in the court to go beyond the pleadings and evidence and render a judgment on a matter not in issue or submitted to it. There are also authorities holding that a judgment obtained by fraud is so far invalid that it is not of conclusive force as an estoppel."
>
> (23 Cyc., 1235-1236).

A long list of cases is cited in support of the text just quoted, including Alabama, Ark., Calif., Ga., Mich., Montana, N. J., N. Y., Utah, Colorado, Indiana, Iowa, Maine, Nebraska, N. C., Tenn., Texas, U. S., and England. We respectfully challenge opposing counsel, and now ask him to point out authority for the Superior Court of King County to enter and make Findings of Fact, Conclusions of Law, and a Decree, upon the record which shows, as we have stated, merely a Show Cause Order mailed to the stockholders notifying them

that a hearing would be had for "call and assessment" upon their alleged stock subscriptions. The statutes of all States specify a given time within which a defendant has to appear before judgment can be rendered against him, and in the State of Washington the period is twenty days if service is made upon defendant within the State. The notice signed by the Superior Court Judge on the 23d of March, 1918, fixes the date for hearing thereon on the 29th day of March, 1918. But why pursue the argument further? May courts shorten the time within which parties are entitled under the law to appear, even conceding that in the instant case the parties were notified that a judgment would be rendered unless they did appear—no such notice having been given, however? Not only was the notice sent to the stockholders, in so far as being a basis for a judgment insufficient, but also the service of the same was insufficient, and likewise the time within which the law gave them for appearance. To say that a judgment procured by writing one of the parties a letter is binding and conclusive upon a court of concurrent jurisdiction is monstrous in the extreme.

Again referring to the order of March 23, 1918, it will be observed that this was made in conformity with the established practice of the State of Washington. In *Chamberlain vs. Piercy*, 82 Wash. 161, the Supreme Court of Washington announces the correct rule in the following language: "The rule in this State, as evidenced by the de-

cisions of this Court, is that where a receiver is appointed for an insolvent corporation, before he can maintain an action against a stockholder it is necessary that such stockholder have notice and an opportunity to be heard upon the *validity of the claims or alleged debts of the insolvent company,* and *that an order be entered directing proceedings against the stockholders whose* subscriptions are unpaid for such amount as, together with the assets, will be sufficient to meet the liabilities and costs of the receivership", citing *Grady vs. Graham,* 64 Wash. 436; 116 Pac. 1098; 36 L. R. A. (N. S.) 177; *Beddow vs. Huston,* 65 Wash. 585; 118 Pac. 752.

A stockholder is not called upon to plead or assert his defenses until suit has been instituted against him, and under the decisions of the Supreme Court of the State of Washington, as will have been noted from the quotation above, the suit cannot be instituted until application has been made to the court in which the receivership proceedings is pending, of which application the stockholder must be given notice in order to have an "opportunity to be heard upon the validity of the claims or alleged debts of the insolvent company". It is quite manifest that this is all that was contemplated under the order of March 23, 1918, to which reference has been made so many times. In the receivership proceedings, that is, in the case of *Kobrinetz et al. vs. Peter Thompson Company,* a judgment was undoubtedly entered, or should have been entered, against the defendant, and on top of

this we have the anomalous situation of another judgment entered in the same proceeding against another party entirely foreign to it.

Whether it would be incumbent upon the receiver in the State Court proceedings to institute an action against the Trustee in Bankruptcy in a proper tribunal is not now a question before the Court. We insist, however, that the Trustee in Bankruptcy of one of the individual stockholders of the insolvent corporation could not have any lesser rights than the individual himself would have had had there been no bankruptcy proceedings. There must be some tribunal where the defenses that a stockholder has, or his successor in interest—Trustee in Bankruptcy in this case—can be asserted. In the instant case we have not questioned the jurisdiction of the Referee in Bankruptcy to pass upon the validity of the claim of the receiver, assuming that it is entitled to be filed at all.

II.

The second objection (Assignment of Error p. 144) urged by the Trustee to the claim of the receiver sets up that the bankrupt had fully paid for every dollar's worth of stock subscribed for by him; that is, that he had been conducting a certain business in the City of Seattle, Washington, in his individual capacity and which he subsequently incorporated, and in so doing turned over to the corporation this individual business in payment for his stock subscription. This involved a question of

fact and would necessitate the taking of testimony. However, the District Judge, under the theory that the King County Judgment entered in the receivership proceedings was binding and conclusive, on motion of the Receiver (pp. 126-127), struck this Objection (pp. 130--31). At no time or place has Peter Thompson or his Trustee been called upon to prove the allegations of fact above set forth. In the preliminary hearing in the receivership proceedings in King County one question only could be considered by that court, namely, the validity of the claims or alleged debts of the insolvent company. (*Chamberlain vs. Piercy, supra*). The reasons advanced in the preceding discussion apply here, and we will not pursue the matter further.

III.

Assignment of Error (c), (p. 144), discloses the third Objection of the Trustee, in brief being that the Peter Thompson Company on the 24th of February, 1917, turned over its business to the Seattle Merchants' Association, the latter organization operating the said business for a time, finally disposing of it and distributing the proceeds to the creditors of the corporation; further setting up that the amount so realized and distributed was sufficient to pay the creditors of the corporation in full and did actually pay them in full, and that all debts contracted by the corporation after the date of its organization, namely, October 5, 1916, had been paid in full, and that the alleged indebtedness represented by the Receiver, Macomber, was con-

tracted by Peter Thompson prior to the organization of the Peter Thompson Company and hence there could be no liability growing out of his stock subscription by reason of said indebtedness. We submit that if the facts as alleged in the Objection are true, the samed constitutes a complete defense to the receiver's claim. At all events, the Trustee should have an opportunity in some tribunal to offer evidence to support the allegation.

The only theory known in law that we are aware of under which a stockholder is held liable for his unpaid subscription is that the capital stock is a trust fund for creditors. That is to say, that where a corporation holds itself out as having a certain capitalization it will be presumed that creditors relied on the representations thus made and extended credit on the faith that the corporation had the given capitalization; and in the event it should develop, when the corporation becomes insolvent, that all of the capital stock had not been paid for, courts of equity will compel those subscribers to pay in the unpaid portion sufficient in amount to take care of the corporate indebtedness, with the limitation, of course, that no subscriber will be held beyond the balance actually due on his subscription. If the indebtedness represented by the Receiver, Macomber, has not been created through an extension of credit to the corporation, but on the contrary through an extension of credit to Peter Thompson as an individual prior to the date of the incorporation of the Peter Thompson

Company, namely, October 5, 1916, then clearly the receiver of the corporation could not set up such indebtedness as a claim against Thompson's alleged unpaid subscription to the stock of the corporation. What has actually happened in the given case—and indeed the Superior Court of King County practically finds as much—is that the corporate assets have been exhausted and enough was realized from that source, and more, to pay the corporate debts in full, and that the only debts not paid are those contracted by Peter Thompson in connection with the Seattle store prior to incorporation. We assert that these facts can be proven and that the Trustee should have an opportunity to prove the same. It may be urged that the corporation assumed the existing indebtedness of Peter Thompson, the individual, so far as the Seattle store was concerned, and without denying this, we are at a loss to see how the Receiver can collect under the guise of liability on an unpaid stock subscription to liquidate a debt that was created prior to the existence of the corporation. Again, it may be urged that these creditors represented by the Receiver at all events have a claim directly, that is, through themselves, against the bankrupt estate. This is a question, however, not now before the Court, and as a matter of fact such claims have been presented and disallowed. Good and complete defenses have at all times been available to the Trustee against the claims of these creditors when presented direct instead of being presented through the shibboleth of an unpaid stock subscription.

IV.

Assignment of Error (d), (p. 145), covers the fourth Objection to the claim in question. Briefly it is that Peter Thompson transferred to the corporation his entire business, including good-will, without a compliance of the Sales in Bulk act of the State of Washington; that at the time of such transfer said Peter Thompson had numerous creditors, including those who are represented by the Trustee herein, and who had sold Thompson merchandise for his Tacoma store, and that any transfer of a stock of merchandise in bulk without a compliance of the Sales in Bulk act of Washington would be null and void as to those creditors not participating in the proceeds from the sale of the merchandise so transferred, and that the creditors represented by the Receiver, Macomber, were the sole beneficiaries of the proceeds from the sale of the said merchandise, and that having appropriated the proceeds to themselves to the exclusion of the other creditors of Thompson, namely, those represented by the Trustee herein, are now estopped to claim against the funds realized from the sale of assets of the Tacoma store. Section 5297 of Remington's Code is as follows:

> "Whenever any person shall bargain for or purchase any stock of goods, wares, or merchandise in bulk for cash or on credit and shall pay any part of the purchase price or execute or deliver to the vendor thereof or to his order or to any person for his use, any promissory note or other evidence of indebted-

> ness for said purchase price or any part thereof without first having demanded and received from said vendor or from his agent the statement provided for in Section 5296 and verified as there provided, and without paying or seeing to it that the purchase money of the said property is applied to the payment of the bona fide claim of the creditors of the vendor as shown upon such verfied statement, share and share alike, such sale or transfer shall be fraudulent and void."

Section 5296 sets forth that the vendor must execute a complete list of his creditors and verify under oath that the same is correct, etc.

Under the decisions of the Supreme Court of Washington, where there is a non-compliance with the Bulk Sales law, it is in legal effect the same as if there had been no transfer whatsoever, and the title to the goods remains in the vendor, and the vendee merely holds the same in trust for creditors. The Seattle Merchants' Association, under its assignment of the 24th of February, 1917, acquired no greater or lesser rights than its assignor, Peter Thompson Company, and whatever obligations might have attached to the assignor these same obligations are binding upon the assignee and must be fulfilled. As is often said, the assignee merely steps into the shoes of his assignor. The receiver appointed more than a year afterwards would acquire no greater rights than the corporation itself had, he being substituted for the assignee, and it follows, therefore, that neither the assignee nor the receiver ever acquired any title to the merchan-

dise transferred or the proceeds therefrom other than that of a trustee title, and that neither the Company nor its successors in interest has fulfilled its obligations to Thompson's creditors existing at the time of the transfer. We quote from *Friedman vs. Branner*, 72 Wash. 338.

> "The statute and its interpretation as found in our previous holdings answers each of these questions in the affirmative. The statute is found in Rem. & Bal. Code 5296 *et seq.* It provides that, in cases of all transfers of merchandise in bulk, or whenever substantially the entire business or an interest therein is disposed of, an affidavit shall be required, showing the names of all creditors, with the indebtedness due or to become due, and that when such affidavit is not taken, or the purchaser shall not see to it that the purchase price is applied to the payment of claims of creditors of the vendors, such sale or transfer 'shall be fraudulent and void.' There can be no question but that under these provisions the sale to Sullivan was void as against the creditors of Branner. The sale being void, the property was the property of Branner in contemplation of law; or, if it or any part of it had been disposed of, the money obtained from its sale was the money of Branner. It is immaterial to what extent the original property obtained from Branner remained in the possession of Sullivan at the time of the garnishment. Unthis statute, *Sullivan had either the property itself or its purchase price.* It was immaterial which; *either was the property of Branner* and subjected Sullivan to garnishment as having money or property of Branner in his posession or under his control.

'In *FitzHenry v. Munter*, 33 Wash. 629; 74 Pac. 1003, and *Kohn v. Fishback*, 36 Wash. 69; 78 Pac. 199; 104 Am. St. 941, we held that, when the statutory affidavit was not taken, the goods attempted to be disposed of by the sale remained the goods of the vendor, and as such in the hands of the vendee were to be regarded as a trust fund, and the vendee the trustee for the benefit of the creditors of the vendor. As in legal contemplation the sale to Sullivan was fraudulent, the possession resulting from the sale was wrongful. Sullivan's position is in law no better than that of a purchaser of property for the purpose of defeating the just claims of his vendor's creditors. He can retain neither the property, nor, in case of its sale, the money obtained therefrom. *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Cowles v. Coe*, 21 Conn. 220. And, since he was wrongfully in possession of the property or its equivalent, Sullivan stands as does any other person who has wrongfully converted property to his use. He cannot say the remedy of those entitled to the property is against the property itself only, but must respond in damages for its conversion. It is, we think, well established that, when a trustee such as Sullivan was in legal contemplation, in violation of his trust disposes of the trust property, he is personally liable."

From the above quotation it is apparent that the sale of the property by Thompson to the corporation was void as against his creditors, and that in contemplation of the law the property in possession of the corporation and subsequently in possession of the Seattle Merchants' Association as trustee, was the property of Thompson, and that the goods attempted to be disposed of by the sale remained

the goods of Thompson and as such must be held by the corporation or its successor in interest as trustee for all the creditors of Thompson. Such being true, what can be said of those creditors, now represented by the receiver, who have wilfully participated and appropriated to their own use the proceeds of the corporate property which, in truth and fact, was the property of Thompson individually and subject to the satisfaction of the claims of all of his creditors regardless of the place of their location? It is a maxim of equity that "he who comes into equity must come with clean hands", and another maxim, that "he who asks equity must do equity". It appears from the Objection that these creditors of the Seattle store have not only appropriated to themselves the entire assets of the Seattle business in defiance of the legal rights of crditors of the Tacoma store, but in addition thereto, after such an appropriation, are brazenly asserting their claims for their pro rata share of the money realized from the sale of the Tacoma store. These creditors have participated in a fraudulent and notorious violation of the rights of the creditors of the Tacoma store. It is apparent, we think, that their conduct has barred them from any consideration at the hands of this Court, and their claims are only entitled to consideration when they pay to the trustee herein the dividends which they have received, so that the entire estate may be pro-rated among all creditors of the bankrupt. And this course of conduct they have not chosen to follow. The very commonplace quotation is applicable, they

are endeavoring "to keep the nickel and the candy both".

Nominally these creditors are endeavoring to collect a stock subscription; actually they are endeavoring to collect debts contracted before a corporation was in existence, and having appropriated the entire estate of the Seattle store, in definance of the rights of creditors of the Tacoma store, should not be heard.

We submit that there is a full and complete estoppel as to these creditors represented by the receiver.

V.

Assignment of Error (e) (p. 146) asserts that the claim of said Macomber as receiver is based upon a contingency and was not an existing debt at the time of adjudication of the bankrupt, and hence not a provable claim. If our contention is sustained in this regard it will be unnecessary for the Court to consider the other Assignments of Error, because this will dispose of the entire claim. Section 63 a-b of the Bankruptcy Act as amended sets forth what debts may be proved. Peter Thompson was adjudged a bankrupt in April, 1917. A receiver was appointed for the Peter Thompson Company in March, 1918, or about eleven months thereafter. As has been already pointed out, the receiver of the corporation asserted that Peter Thompson had not fully paid for the stock subscribed for by him in the corporation in that the property turned over by

Thompson in payment of his stock subscription was not worth what Thompson and the corporation agreed between themselves it was worth, and upon that theory secured from the Superior Court of King County, Findings and Decree to the effect that Thompson had not paid for his subscription in full. At the threshold it will be noted that the alleged liability of Thompson is not based on a subscription contract payable in cash or in certain installments or subject to call; but on the contrary is based on the supposition that Thompson turned over property of insufficient value, and hence the corporation and himself perpetrated an implied fraud upon the creditors of the corporation.

Section 63 of the Bankruptcy Act sets forth certain debts which may be proved, and the parts thereof which are pertinent to the inquiry here are "founded on an open account or upon an account expressed or implied; and founded upon provable debts reduced to judgments after filing of the petition", etc. There is no provision in the section for the proving of contingent liabilities, and the difference between this Act and the Act of 1867 is noteworthy, the latter providing as follows:

> "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividends; or he may, at any time, apply to the court to have the present value of the debt or liability ascer-

> tained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained." (Collier, p. 977—Note 230 Bankr. Act. 1867, Art. 19, R. S. Art. 5068).

As between the creditors of the corporation and Thompson, his liability is dependent upon two things, namely: First, whether or not the corporation has sufficient assets to pay its creditors in full. If there were sufficient assets the creditors, or the receiver as their representative, could have no just cause to complain against a stockholder who had not paid his subscription in full. Secondly, certain steps have been laid down by the Supreme Court of Washington as a prerequisite for fixing liability when the assets of a corporation are insufficient. *Grady vs. Graham*, 64 Wash. 436; *Beddow vs. Huston*, 65 Wash. 585. It is clear that there are two contingencies, namely: (a), where the *existence* of an alleged claim depends upon a contingency; and (b), where the *right to assert* a claim depends upon a contingency. The Bankruptcy Act has never recognized the provability of claims where the former situation exists, either under the old Acts or under the Act of 1898. Under the head of Contingent Liabilities (Collier, 11th Ed. *et seq.*), Mr. Collier says:

> "There is a broad distinction between 'unliquidated damages' and 'contingent liabilities'. The phrase 'unliquidated claims' may refer to both. The former law provided for the liquidation of contingent debts and liabilities, and the cases under it, as well as those

> under its predecessors, drew a clear distinction between demands whose existence depended on a contingency and existing demands where the cause of action depended on a contingency; the former not being provable in any event and the latter only when liquidated. The present law has no similar clause and it has been vigorously asserted that contingent claims cannot now be liquidated or proven."

In connection with the above we respectfully direct the Court's attention to the note contributed by Mr. James W. Eaton, former editor of Collier's, appearing on page 978, Collier's 11th Edition.

The contention which the Trustee makes in the instant case is that the claim of the receiver, Macomber, is not a provable claim even under the old Act, to say nothing of its status when considered in the light of the new Act. The District Judge refers to several cases in his opinion, the first being

In re Rouse, 1st Am. B. R. 393.

It is interesting to note that Mr. Remington (this opinion was written by Mr. Remington as Referee in Bankruptcy and apparently was not reviewed by the District Court), discusses whether or not the claim was provable under the Bankruptcy Act of 1867; and, second, he states on page 408:

> "We must bear in mind that this objection is introduced at first meeting of creditors, when we are receiving proofs of debt for the purpose of selecting a trustee, and not at a subsequent meeting of creditors, nor for the

allowance of claims for a dividend. In proving debts for the purpose of choosing a trustee, it seems from a consideration of the clauses of the act *in pari materia*, we are not expected to be extremely accurate.

"The proof accepted by the Referee at the first meeting is by no means final. The claims are subject to modification, diminution, or rejection."

It is interesting to note, however, that in the particular case he did not allow the claim even for voting purposes, not on the ground, however, that it was not a provable debt. He considers the claim in connection with the statutes of Ohio. The particular statute applicable is not quoted, but apparently is very much like the old statutes in various states, which make stockholders personally liable for the debts of the corporation regardless of whether or not they have paid their subscriptions in full. Mr. Remington says, "It is a collateral security for the benefit of creditors * * * a contract of suretyship for corporate debts". In other words, under the Ohio statute, the liability of a stockholder was the same as the liability of a surety on a note, that is, an *absolute liability*, and finally the author, by way of conclusion, lays down this rule, "Therefore I would say that in Ohio the individual liability of stockholders for debts of an insolvent corporation is a provable debt in bankruptcy whenever the circumstances are such that a stockholder's suit would lie". As pointed out, this conclusion was reached at the first meeting of creditors. The

author assumed that under the Ohio statutes the liability was fixed and the debt actually existing *at the time the stockholder filed his petition in bankruptcy.* In the instant case, of course, the bankruptcy preceded the receivership nearly a year and there was no liability until it had been determined whether or not there was sufficient corporate assets to pay the corporate debts, and not even then until there had been a further determination by some competent tribunal that the property turned over by Thompson was insufficient to pay his subscription.

Dight vs. Chapman, 12 Am. B. R. 743; 65 L. R. A. 785, not cited by the District Court, is a case shedding some light on the matter under discussion. The facts in this case are these:

In September, 1890, the Duluth Dry Goods Company was incorporated in Minnesota and issued 1309 shares of stock of the par value of $100.00 each, fifty shares of which defendant Chapman subscribed for. Under the constitution and laws of Minnesota a stockholder is liable for the debts of the corporation to the extent of the par value of the stock held, which obligation is enforcible by a receiver appointed for that purpose. In February, 1899, a decree was entered establishing the indebtedness of the corporation and awarding recovery against it and against the stockholders severally for sums equal to the par value of the stock owned by each, and in pursuance of that decree Dight was appointed receiver to make the col-

lection from the stockholders. In January, 1900, Chapman filed a petition in bankruptcy, and in filing his schedules he did not include his liability on his stock subscription, although it appeared that he had full knowledge of the proceedings in Minnesota. The question arose therefore as to whether or not Chapman was released of his obligation of the Minnesota judgment by his discharge in bankruptcy. The Court says:

> "It will be remembered that the defendant did not appear in the original suit, but as a decree in that case was rendered, *prior to his being adjudged a bankrupt*, whereby all the stockholders were required severally to pay a sum of money equal to the par value of their stock, such decree resolved the uncertainty, imposed the contractual liability and, in our opinion, rendered the sum so awarded a 'provable' debt within the meaning of the bankruptcy act. (*Riggins vs. Magwire*, 15 Wall. 549; 21 L. Ed. 232; *Re Fife*, 109 Fed. 880)."

But one inference can be drawn from this case, namely: had not the stockholders' suit been prior to the bankruptcy, and thus "resolved the uncertainty", and "imposed the contractual liability", the claim would not have been provable.

In the case of *In re Walker*, 21 Am. B. R. 132, also not cited by the District Court, the question arose as to the construction to be placed upon the banking statutes of California. The constitution of that State as well as the statute makes stockholders of a bankrupt corporation liable for his proportion of the debts of the corporation during

the time he was such stockholder, which liability, according to the previous decisions of the California court, arises at the time when deposits are made. We have a somewhat similar statute in the State of Washington, except that a stockholder's liability is double the amount of his subscription to the stock. The Supreme Court of California has also held that the statute was a part of the contract made by the stockholder and hence created an absolute liability. The question in the particular case under discussion arose on a demurrer to the sufficiency of the petition. The opinion announces nothing not in harmony with the contention we make in the case at bar.

The case of *Van Tuyl vs. Schwab et al.*, 38 Am. B. R. 161, cited by the District Judge, raised a very similar question to that in *In re Walker*, *supra*. The New York court was called upon to interpret the banking statutes of that State, and in that connection says:

> "It is, of course, well established that a debt, in order that it may be discharged in bankruptcy, must not only answer the above description (referring to Sec. 63 of the Bankruptcy Act), *but must also be provable at the date on which the petition in bankruptcy is filed.*"

The Court then quotes a section of the bankruptcy law under which the stockholders are being charged, and concludes that under the previous decisions of New York a subscriber in a *bank* incorporates into his contract the statute in question and

that therefore such subscriber is *absolutely* liable at all times. The Act says:

> "If default shall be made in the payment of any debt or liability contracted by any such corporation, the stockholders thereof shall be individually responsible equally and ratably."

Says the Court also in referring to *Corning vs. McCullough*, 1 N. Y. 55:

> "The words affixing liability to the stockholders under that case are precisely equivalent to the words used in the banking law above quoted. *The liability is made absolute.*"

It is interesting to note also in connection with the case under discussion that the Superintendent of Banks under the State of New York took possession of the bank in question, the Carnegie Trust Company, on January 1, 1911, and that an involuntary petition in bankruptcy was filed against the respondent on April 12, 1911, and he was adjudicated in November, 1912. In other words, the statutory receiver took charge of the bank prior to the bankruptcy of the individual stockholder, and even if the statute had not made the liability of the stockholder an absolute one, it became fixed and determined, that is, it was an existing debt at the time of the filing of the petition in bankruptcy by the stockholder.

The Court was very careful to say in the *Van Tuyl* case that the debt, in order to be a proper claim against the bankrupt estate, "*must be provable at the date on which the petition in bankruptcy is filed.*"

Where property is turned over to a corporation at a fixed value in payment of a subscription to the capital stock the contract is absolutely binding between the parties, and only where it appears that the property so turned over was of such insufficient valuation as to amount to a fraud on creditors can the transaction be attacked, and only then, of course, when the corporation becomes insolvent and has not sufficient assets with which to liquidate its indebtedness. No one disputes this ruling. It is the application of it to the instant case that has given rise to differences of opinion. The District Judge refers to the Washington statute quoting, "Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock and not otherwise". However, what follows, which is not quoted, "Provided that the stockholders of every bank incorporated under this Act or the Territory of Washington shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares". (Rem.'s Code, Sec. 3698). It is very evident that the object of the statute is to limit the liability of stockholders of private corporations in distinction to banking corporations so that they could never be called upon to respond to any greater extent than the unpaid portion of their

subscription. The statute, in our judgment, adds nothing to the contract made by a stockholder. He has always been liable, even at common law, to carry out his contract of subscription, and the purpose of the statute is, as we see it, simply to *limit* and define his liability.

Thompson's liability, conceding for the argument that he is liable at all, could not and did not arise or come into being until many months after he was adjudicated a bankrupt. It requires, we think, quite a stretch of the imagination to say that at the time Thompson was adjudicated a bankrupt, or at the time of the filing of his petition, the claim in question was an *existing* debt. Assuming that Thompson turned over property of insufficient valuation, it is clear that he might or might not be called upon to pay the difference between what he did pay and what he obligated himself to pay. If, perchance, the corporation had been successful or had accumulated sufficient assets from another source so as to pay its creditors in full Thompson could never have been called upon and would never have been liable, and the conditions under which the liability arose in the present case necessarily created the liability many months after the bankruptcy proceeding.

The District Judge has also cited, without comment, the case of *Irons vs. The Bank*, 27 Fed. 591. The opinion in this case is a review of a previous decision of the court made by the same Judge and reported in 17 Fed. 308. We think that this case

very much sustains our position. A reference to the same in the 17 Fed., particularly to page 314 thereof, discloses that the court is discussing the Bankruptcy Act of 1867, heretofore quoted, and which was repealed by the Amendment of 1898. The question before the court was on the liability of stockholders in a National bank, and involved the interpretation of the National Banking Act, which was similar to the New York Banking Act, referred to in the *Van Tuyl* case.

Judge Blodgett in 27 Fed. says:

> "I think the fallacy of much of the argument in this case results from the examination that the provisions of the Banking law in regard to the enforcement of the individual liability of the stockholders for the payment of debts is to be construed and governed by the rules in regard to the statutory liability of the stockholders in State corporations."

In brief, the opinion is based on the supposition that under the National Banking Act the subscriber's obligation is absolute and not contingent. However, it is not necessary to even decide this question, in view of the Bankruptcy Act of 1867.

It is also interesting to note, in passing, that an action had been begun to enforce stockholders' liability in February, 1875, and a receiver was appointed a few days thereafter. In 1876 an amended bill was filed and the defendants were all adjudged bankrupt after the filing of the amended bill. We have then before us the provisions of the old Bankruptcy Act of 1867, the further specific provisions

of the National Banking Act, coupled with the further fact that steps had been taken to enforce the absolute liability of the stockholders prior to the time that said stockholders went into bankruptcy. The District Judge has also cited the case of *Cary vs. Mayer*, 79 Fed. 926. This case is not unlike those previously discussed, and an examination of the same shows it is not in conflict with the position taken by the trustee. Mayer, prior to 1866, was the holder and owner of 450 shares of the capital stock of a Virginia corporation of the par value of $100.00 per share. When he acquired this stock there had been paid on account of the same $20.00 per share. The law of Virginia required that $2.00 per share should be paid at the time subscription was made, and that the residue should be paid as required by the president and directors.

In September, 1866, the corporation made a trust deed of all of its property to three trustees, who continued to operate and manage the business. Nothing was done by the trustees or the officers of the corporation looking to a call upon the balance of the subscription contract, and in 1871 a creditors' suit was commenced, the object of which was to compel a call of the unpaid subscriptions sufficient to pay the debts of the company. Nothing was done on this suit until 1880, a little more than nine years afterward, when a decree was entered making a call of thirty per cent on the various stockholders. In 1868 Mayer applied to the District Court of New York to be declared a bankrupt.

Subsequently, in 1879, he was discharged by the court from all debts and claims which were provable against his estate on March 29, 1868.

The question in the case was whether Mayer was discharged from his stock liability, the amount of which was fixed and determined by the decree in 1880. At the threshold, the question of laches on the part of the corporation and its successors appears to be a very persuasive feature in the case. The Court properly held that Mayer had been discharged and in that connection discussed the old Bankruptcy Act. It will be noted also that in this case there was an express contract to pay a given amount of money. The time when the payment was to be made was left by the terms of the contract to the president and board of directors, or their successors. Manifestly the debt was an absolute liability at the time Mayer went into bankruptcy. His contract was the equivalent of a promissory note.

In speaking of the Act of 1867, the Court says:

> "Section 5068 (Revised Statutes) provided that the creditor could make claim for a contingent debt or a contingent liability and have his claim allowed with the right to share in the dividends if the contingency happened before the order for the final dividend. A contingent debt or liability is not provable when the time for its becoming a debt is uncertain and not ascertainable, or the amount is uncertain and not to be ascertained", citing *Riggins vs. Magwire*, 15 Wall, 549; *Wolf vs. Stix*, 99 U. S. 1.

In speaking of the duties of the trustees relative to their obligations to have the call made either by the corporation or a proper court, the opinion further stated:

> "This intervention it was the duty of the trustees to obtain. They could not properly lie still, and permit these assets to disappear by the death or the insolvency of the stockholders; and we can now see that, if they had set proceedings in motion before a Virginia court in 1866, an assessment would have been made within a reasonable time. There was no practical difficulty, under the facts disclosed in the record, which should have prevented the trustees from presenting their claim against the bankrupt estate, and if the assessment should be made by the court of chancery before the final dividend, of having the claim allowed in the amount which that court should have ascertained".

Applying this case to the one at bar, it is evident that if the Act of 1867 was still the law and Peter Thompson had paid only $20.00 on account of his subscription, and it had been provided that he should pay the balance in money when called upon by the trustees of the corporation, then the *Mayer* case would be in point. When we remember, however, that Thompson claims to have paid his subscription in full, and he certainly has so far as relations between himself and the corporation are concerned, and remember further that the basis of the alleged liability of Thompson is his fraudulent act in turning over property of insufficient valuation, which would require the solemn decree of a

proper tribunal to create the debt, we can appreciate the distinction between the two cases.

It is interesting to note also that in the case under discussion the Court comments on the old English case of *The Railway Co. vs. Burnside*, 5 Exch. 129, and quotes therefrom as follows.

> "The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time not exceeding a certain sum and regulated by the wants of the Company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted".

The New York Circuit Court took the position that this English case was not in point, although it is interesting to note that it is cited as an authority for the position taken by the Supreme Court of the United States in *Garrett vs. American File Co.*, 110 U. S. 288, which we will refer to later on.

In *Riggins vs. Magwire*, cited above, the Supreme Court of the United States establishes this rule, "Where the claim is founded upon a contingency contained in a contract which may never arise *and there is no means of ascertaining the amount of the claim at the time of the filing of the petition*, the claim is not provable". This disposes of the cases cited by the District Court.

The rule for which we contend is stated in 7 R. C. L., par. 397,

> "Calls made and remaining unpaid prior to the bankruptcy of a stockholder, undoubtedly are covered by his discharge in bankruptcy; but such discharge is no bar to an action for an instalment subsequently called for, *the unpaid and uncalled subscription not constituting such a debt or liability as is provable against his estate in bankruptcy.* It seems that a discharge in bankruptcy releases a shareholder from his statutory liability to creditors of the corporation, where, at the time of his discharge, the claims of the creditors were provable and not merely contingent.
>
> "Also where the assignees in bankruptcy of a stockholder never accepted the stock and never consented to become stockholders in the company, neither they nor the assets of the bankrupt in their hands are subject to the individual liability of stockholders for the debts of the corporation."

See also 5 Cyc. 324, to the effect:

> "There is no provision in the present act making a contingent liability provable in bankruptcy."

In re Mullins Clo. Co., 38 Am. B. R. 189, quoting from page 199, we find,

> "The Bankruptcy Act of 1841 and that of 1867 provided for the allowance of contingent claims. The present Act, however, makes no provision for the proving of such claims, and it is well understood that they are not provable".

In discussing section 63-b of the Act of 1898, with reference to unliquidated claims, the Court, after quoting same, says:

> "This, however, relates merely to the procedure and does not define an additional class of debts which are provable", citing
>
> *Dunbar vs. Dunbar*, 190 U. S. 340-350; 10 Am. B. R. 139.

Also in

Zevela vs. Reeves, 227 U. S. 677,

the Supreme Court holds emphatically that in relation to debts founded upon open accounts or upon a contract, express or implied, which may be provable under the Bankrupt Act of 1898, there is included only such as existed at the time of filing of the petition in bankruptcy.

We respectfully submit that the receiver's claim must be disallowed for the reason it was not in existence at the time Thompson filed his petition in bankruptcy. The validity of any claim against him depended upon two contingencies:

1. That he and the corporation had committed fraud in accepting the property in full payment of his stock subscription.

2. That there had been a preliminary hearing as outlined in *Chamberlain vs. Piercy, supra.*

Neither of these things was done until after Thompson filed his petition in bankruptcy.

VI.

The sixth and final Assignment of Error (f) (pp. 146-147) presents the question of the right of the trustee to reject the stock of the corporation as a burdensome asset, and by thus rejecting it relieve himself and the estate which he represents from any liability growing out of it. 4 Thompson on Corporations, 2d Edition, par. 4897, states the rule as follows:

> "It seems that no court has held that the assignees of insolvent estates, part of whose assets consist of corporate stock, are subject to the statutory liability imposed upon stockholders. And the fact that an assignee attended the corporate meetings and acted as a stockholder was held insufficient to make him liable. The same principle has been applied in cases arising under the Bankruptcy law on the theory that an assignee is not bound to accept property of an onerous or unprofitable character".

Again, in 5 Thompson on Corporations, 2 Ed., in the latter portion of par. 5192, where a long list of cases is cited, we find,

> "A discharge in bankruptcy of the stockholder will not release the stockholder unless he has turned over the shares to the assignee and he has accepted them. The rules do not require the assignee in bankruptcy to accept onerous property of the bankrupt".

The case of the *American File Co., vs. Garrett*, 110 U.S.288,28 *Law Ed.*, 150, the Supreme Court of

the United States seems to have definitely settled this question in favor of our contention:

"It is well settled that, under the circumstances of the case, neither the assignees nor the assets in their hands are subject to the individual liability which attaches to stocks held by the bankrupt. The evidence does not show that the assignees acted in any way as stockholders, that they ever attended meetings of the corporation, or that their names appeared upon the books, or that they treated the stock standing in Chapman's name as an asset of his estate. They merely had in their possession the certificates of stock and yielded to Garrett & Sons any claim to the bonds of the American File Company belonging to Chapman or his firm, and took an indemnity against any supposed liability which might attach to them as holders of the stock belonging to the estate of Chapman.

"In *Gray v. Coffin*, 9 *Cush.* 192, the Supreme Court of Massachusetts, having under consideration a law of that State almost identical with the Rhode Island statutes, held that the individual liability of 'stockholders did not attach when their assignee had attended and voted at meetings of the corporation and done other acts of unequivocal ownership.' The same result would follow under the bankruptcy law. It has long been a recognized principle of the bankruptcy laws that the assignees were not bound to accept property of an onerous or unprofitable character. *South Staffordshire R. Co. v. Burnside*, 5 Exch. 129; *Furdoonjee's Case*, 3 L. R. Ch. Div. 268; *Ex. parte Davis*, 3 L. R., *Ch. Div.*, 463; *Streeter v. Sumner*, 31 N. H. 542; *Amory v. Lawrence*, 3 Cliff. 523; *Rugely v. Robinson*, 19 Ala. 404. As the assignees of Chapman never accepted

the stock, and never consented to become stockholders in the American File Company, it follows that neither they nor the assets of Chapman in their hands are subject to the individual liability of stockholders for the debt of the Corporation." (*American File Co. v. Garrett*, 25 Law. Ed. (U. S.) 152).

Respectfully submitted,

W. W. KEYES,
Attorney for Petitioner.

No. 3454

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY NUDELMAN,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the District of Oregon.

No._____

United States
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Upon Writ of Error to the United States District Court for the District of Oregon.

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For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To the United States of America, and to B. H. GOLDSTEIN, United States Attorney for the District of Oregon, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Harry Nudelman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 5th day of December, in the year of our Lord one thousand nine hundred and nineteen.

CHAS. E. WOLVERTON,
Judge.

Due service of the within citation accepted this 5th day of December, 1919.

JOHN C. VEATCH,
Asst. U. S. Attorney.

[Endorsed]: United States District Court, District of Oregon. Filed Dec. 5, 1919. G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HARRY NUDELMAN,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

The United States of America,—ss.
The President of the United States of America, to the Judges of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable

CHARLES E. WOLVERTON, one of you, between the United States of America, plaintiff and defendant in error, and Harry Nudelman, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of December, 1919.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

I hereby certify that the foregoing writ of error was duly served upon the District Court of the United States for the District of Oregon by filing with me, as the Clerk of said Court, a duly certified copy thereof on this 5th day of December, 1919.

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

[Endorsed]: Filed Dec. 5, 1919. G. H. Marsh, Clerk United States District Court, District of Oregon.

BE IT REMEMBERED, that on the first day of March, 1919, there was filed in the United States District Court for the District of Oregon an Indictment, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA
vs.
HARRY NUDELMAN, Defendant.

Indictment for Violation of Act of February 13, 1913.

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn, and charged to inquire within and for said

District, upon their oaths and affirmations, do find, charge, allege and present:

COUNT ONE.

That on, to-wit: the 2d day of October, 1918, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did wilfully, knowingly, unlawfully and feloniously steal, carry away, and conceal, with the intent on the part of him, the said defendant, to convert to his, the said defendant's, own use, certain goods and chattels, to-wit:

Fifty (50) 32" x 3½" rubber inner tubes for automobile tires;

Two (2) 33" x 4½" rubber inner tubes for automobile tires;

and Twenty (20) 34" x 4" rubber inner tubes for automobile tires,

from a railroad car, to-wit: car initialed and numbered G. T. 10457, and then and there, at said time and place, being in the freight yards of the Oregon-Washington Railroad & Navigation Company, a common carrier, in Portland, aforesaid, said goods and chattels, above particularly described, then and there, at said time and place, being a part of an interstate shipment of freight, to-wit: a shipment of freight from Morgan & Wright Factory, at Detroit, Michigan, to the United States Rubber Co., at number 24-26 North Fifth Street, Portland, Oregon,

over the lines and routes of said Oregon-Washington Railroad & Navigation Company, and connecting carriers to the Grand Jurors unknown, and then and there at said time and place, being in the custody and control of said Oregon-Washington Railroad & Navigation Company; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO.

That on, to-wit: the 11th day of January, 1919, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did knowingly, wilfully, unlawfully and feloniously have in his, the said defendant's, possession certain goods and chattels, to-wit:

Nine (9) 34" x 4" rubber inner tubes for automobile tires;

One (1) 32" x 4" rubber inner tubes for automobile tires; and

Two (2) 33" x 4½" rubber inner tubes for automobile tires,

said defendant, at said time and place, knowing said goods and chattels to have been stolen, and said goods and chattels, at said time and place, be-

ing a part of an interstate shipment of freight, to-wit: a shipment from Morgan & Wright Co., Detroit, Michigan, to United States Rubber Co., at number 24-26 North Fifth Street, Portland, Oregon, over the lines and routes of the Oregon-Washington Railroad & Navigation Company, a common carrier, and other carriers to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE.

That on, to-wit: the 25th day of January, 1919, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did knowingly, wilfully, unlawfully, and feloniously have in his, the said defendant's, possession certain goods and chattels, to-wit:

Ten (10) 32" x 3½" rubber inner tubes for automobile tires; said defendant at said time and place, knowing said goods and chattels to have been stolen, and said goods and chattels, at said time and place, being a part of an interstate shipment of freight, to-wit: a shipment from Morgan & Wright Co., Detroit, Michigan, to United States

Rubber Co., at numbers 24-26 North Fifth Street, Portland, Oregon, over the lines and routes of the Oregon-Washington Railroad & Navigation Company, a common carrier, and other carriers to the Grand Jurors unknown; contrary to the form and statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FOUR.

That on, to-wit: the 6th day of January, 1919, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did knowingly, wilfully, unlawfully, and feloniously have in his, the said defendant's, possession certain goods and chattels, to-wit:

Twelve (12) 34" x 4" rubber inner tubes for automobile tires, said defendant, at said time and place, knowing said goods and chattels to have been stolen, and said goods and chattels, at said time and place, being a part of an interstate shipment of freight, to-wit: a shipment from Morgan & Wright Co., Detroit, Michigan, to United States Rubber Co., at numbers 24-26 North Fifth Street, Portland, Oregon, over the lines and routes of the Oregon-

Washington Railroad and Navigation Company, a common carrier, and other carriers to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FIVE.

That on, to-wit: the 1st day of February, 1919, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did knowingly, wilfully, unlawfully and feloniously have in his, the said defendant's, possession certain goods and chattels, to-wit:

Nineteen (19) 32" x 3½" rubber inner tubes for automobile tires, said defendant, at said time and place, knowing said goods and chattels to have been stolen, and said goods and chattels, at said time and place, being a part of an interstate shipment of freight, to-wit: a shipment from Morgan & Wright Co., Detroit, Michigan, to United States Rubber Co., at numbers 24-26 North Fifth Street, Portland, Oregon, over the lines and routes of the Oregon-Washington Railroad & Navigation Company, a common carrier, and other carriers to the Grand

Jurors unknown; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SIX.

That on, to-wit: the 2d day of February, 1919, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, Harry Nudelman, the defendant above named, did knowingly, wilfully, unlawfully, and feloniously have in his, the said defendant's, possession certain goods and chattels, to-wit:

Five (5) 32" x 3½" rubber inner tubes for automobile tires, said defendant, at said time and place, knowing said goods and chattels to have been stolen, and said goods and chattels, at said time and place, being a part of an interstate shipment of freight, to-wit: a shipment from Morgan & Wright Co., Detroit, Michigan, to United States Rubber Co., at numbers 24-26 North Fifth Street, Portland, Oregon, over the lines and routes of the Oregon-Washington Railroad & Navigation Company, a common carrier, and other carriers to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 1st day of March, 1919.

A TRUE BILL.

GRAHAM GLASS,
Foreman, United States Grand Jury.
JOHN C. VEATCH,
Assistant United States Attorney.

Indorsed:

A True Bill—Graham Glass, foreman Grand Jury. Filed in open court, March 1, 1919. G. H. Marsh, Clerk.

AND AFTERWARDS, towit, on Tuesday, the 8th day of April, 1919, the same being the 32d JUDICIAL day of the Regular March term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF ARRAIGNMENT AND PLEA.

In the District Court of the United States for the District of Oregon.

No. 8334.

April 8, 1919.

THE UNITED STATES OF AMERICA

vs.

HARRY NUDELMAN, Defendant.

Indictment Violation Act. Feb. 13, 1913.

Now on this day comes the plaintiff by Mr. John

C. Veatch, Assistant United States Attorney, and the defendant above named in his own proper person, and by Mr. Roscoe C. Nelson, of counsel. whereupon said defendant being duly arraigned upon the indictment herein for plea thereto says he is not guilty.

AND AFTERWARDS, to-wit, on Monday, the 9th day of June, 1919, the same being the 84th JUDICIAL day of the Regular March term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF EMPANELLING JURY.

No. 8334.

June 9, 1919.

UNITED STATES OF AMERICA

vs.

HARRY NUDELMAN, Defendant.

Now on this day come plaintiff, by Mr. J. C. Veatch, Assistant United States Attorney, and by Mr. Roscoe C. Nelson and Mr. Robert F. Maguire of counsel. Whereupon this being the day set for trial of this cause now come the following named jurors to try the issues joined, viz.: Charles A. McKee, A. L. Butler, Edward W. Jones, C. Hunt Lewis, William L. Nash, J. G. Iddings, W. J. Fullerton, Charles Powers, Adolph A. Dekum, William E.

Estes, Dan L. Erdman and J. D. Allen; twelve good and lawful men of the District who, being accepted by both parties and being duly empanelled and sworn, proceed to hear the evidence deduced.

AND AFTERWARDS, to-wit, on Wednesday, the 11th day of June, 1919, the same being the 86th JUDICIAL day of the regular March term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF VERDICT.

No. 8334.

June 11, 1919.

UNITED STATES OF AMERICA

vs.

HARRY NUDELMAN, Defendant.

Verdict.

————And the jury returns to the Court the following verdict (defendant and respective counsel for the parties being present): "We, the jury duly empaneled to try the above entitled cause, do find the defendant guilty as charged in Count One of the Indictment, and guilty as charged in Count Two of the Indictment, and guilty as charged in Count Three of the Indictment, and guilty as charged in Count Four of the Indictment, and guilty as charged in Count Five of the Indictment, and guilty as charged in Count Six of the Indictment.

Dated at Portland, Oregon, this 11th day of June, 1919.

J. G. IDDINGS,
Foreman."

which verdict is received by the Court and ordered filed.

AND AFTERWARDS, to-wit, on Thursday, the 31st day of July, 1919, the same being the 22nd JUDICIAL day of the regular July term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF SENTENCE.

No. 8334.

July 31, 1919.

UNITED STATES OF AMERICA

vs.

HARRY NUDELMAN, Defendant.

Sentence.

Now at this day comes plaintiff by John C. Veatch, Assistant United States Attorney, and defendant Harry Nudelman in his own proper person and by Roscoe C. Nelson of counsel. Whereupon this being the day set for the sentence of said defendant upon the verdict herein.

It is adjudged that the said defendant be imprisoned in the United States Penitentiary at Mc-

Neil's Island, Washington, for the term of thirteen months, and that he stand committed until his sentence be performed or until he be discharged according to law.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

Petition for Writ of Error.

To the Honorable CHARLES E. WOLVERTON, Judge of the above entitled Court:

And now comes Harry Nudelman, the defendant herein, and by his attorneys, Roscoe C. Nelson and John Manning, respectfully shows that on the 11th day of June, 1919 a jury duly empaneled herein found your petitioner guilty of the violation of the Act of Congress approved February 13th, 1913 (37 Stat. L. 670), upon which said verdict sentence was passed and final judgment entered against your petitioner on the 31st day of July, 1919.

Your petitioner feeling himself aggrieved by said verdict and judgment in which judgment and proceedings had prior thereto certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the bill of ex-

ceptions and the assignment of errors filed with this petition, does herewith petition the Honorable Court for an order allowing him to prosecute a writ of errors to the United States Circuit Court of Appeals for the Ninth Circuit under the rules and laws of the United States in such case made and provided.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that an order be made approving the bond of your petitioner and staying all further proceedings until the determination of such Writ of Error by said Circuit Court of Appeals and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth District.

HARRY NUDELMAN,
Defendant.

ROSCOE C. NELSON,
JOHN MANNING,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the foregoing petition

is hereby accepted at the City of Portland this 5th day of December, 1919.

JOHN C. VEATCH,
Asst. United States Attorney.

[Endorsed]: United States District Court, District of Oregon. Filed Dec. 5, 1919. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defenadnt.

Assignment of Errors.

Harry Nudelman, the defendant in the above entitled action and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause against said plaintiff in error, and petitioner herein, now makes and files with the said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great

detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

I.

That the Court erred in over-ruling the motion of the defendant for an order of the Court requiring the United States to elect whether or not they would prosecute the defendant for the theft of the goods alleged in the indictment to have been stolen, or would prosecute him for having said goods in his possession, knowing them to have been stolen.

II.

That the Court erred in admitting, over the objection of defendant, the testimony of F. H. Drake concerning his relations with another witness named Hyman Cohen.

III.

That the Court erred in admitting in evidence, over the objection of defendant, the testimony of W. J. Roope, relative to the employees of the United States Rubber Company being prohibited from doing a jobbing business of goods handled by the said company.

IV.

Upon the conclusion of the testimony the defendant again moved the Court to require the United States to elect whether they would proceed against the defendant upon Count One of the indictment, charging him with theft of the goods mentioned herein, or whether they would proceed against him upon the count of the indictment charging him with receiving said goods, knowing them to be stolen, it being conceded by the United States that the goods alleged to have been stolen in Count One and the goods alleged in the other counts to have been in the possession of the defendant, with knowledge that they had been stolen, are one and the same. The Court erred in over-ruling said motion.

V.

That the Court erred in over-ruling the motion of the defendant to dismiss the indictment against the defendant upon the following counts:

As to Count One, that the said count does not state facts sufficient to constitute a crime, and that it does not describe or name the owner, bailee or custodian of the goods.

As to Count Two: that Count Two does not state facts sufficient to constitute a crime, in that it does not allege that the goods in question were, when stolen, in interstate commerce, and in that it

does not allege that they were stolen from any railroad car, station house, warehouse, platform, depot, steamboat or vessel of any common carrier; and in that it does not describe or name the owner, bailee or custodian of the goods sufficiently to identify them.

As to Counts Three, Four, Five and Six, the same grounds and reasons are urged as are urged as to Count Two.

VI.

That the Court erred in refusing the request of the defendant to instruct the jury to find the defendant not guilty as to Count One of the indictment, for the reason that there is a fatal variance between the allegations of the indictment and the proof, in that it appears from the evidence that the goods alleged in the indictment to have been stolen from G. T. Car 10457 were not stolen from that car at all, but were removed from that car and placed in the freight shed by employees of the United States Railroad Administration. And it further appears from the evidence that it was not stolen from any railroad car, station house, warehouse, platform, station, depot or freight house in the freight yards of the Oregon-Washington Railroad & Navigation Company, for the reason that it appears from the testimony that the Oregon-Washington Railroad & Navigation Company, at the time the goods were alleged to have been stolen,

was not a common carrier, and that the goods were not being transported over the lines and routes of such company, were not in the custody and control of the company, but were in the freight yards of the United States Railroad Administration, and were transported over the lines and routes of the United States Railroad Administration, and were in the custody and control of the said Railroad Administration.

VII.

That the Court erred in refusing the request of the defendant that the Court instruct the jury that there had been a failure to identify the tubes offerred and referred in evidence as a part of the shipment of tubes, concerning which there had also been testimony.

VIII.

That the Court erred in refusing to instruct the jury, as requested by defendant, that there had been no showing in evidence that the case was stolen, and that the evidence so far revealed is consistent with the position of the defendant that the case which is alleged to have been stolen has subsequently been found by the Railroad Administration.

IX.

That the Court erred in refusing to instruct the

jury, as requested by the defendant, about finding the defendant not guilty as to Counts Three, Four, Five and Six of the indictment, upon the several grounds set forth in the motion of defendant to dismiss the said counts, which motion is hereinbefore particularly set out in Assignment of Error No. V.

X.

That the Court erred in refusing to instruct the jury upon the request of the defendant, that the evidence does not support the allegations of the indictment, and that there is no proof of the defendant's guilt under said indictment or any count thereof.

XI.

That the Court erred in refusing the request of defendant to instruct the jury as follows:

> "If the jury finds from the evidence that the defendant stole, carried away or concealed the goods described in the indictment with intent on his part to convert the same to his own use, and that the goods described in Count One of the Indictment are the same and identical goods described in counts two, three, four, five and six of the indictment, then the jury are instructed to acquit the defendant as to Counts two, three, four, five and six."

XII.

That the Court erred in refusing the request of the defendant to instruct the jury as follows:

"That unless the jury finds from the evidence that the goods described in counts two, three, four, five and six of the indictment are different goods from those described in Count one thereof, then the jury must acquit the defendant as to Counts two, three, four, five and six, provided they find from the evidence that the defendant stole the goods described in Count one."

XIII.

That the Court erred in refusing the request of the defendant to instruct the jury as follows:

"Under the indictment and evidence in this case, the defendant cannot be convicted by the jury of both the crime of stealing the goods and with having them in possession knowing them to be stolen. If the jury finds from the evidence that the defendant stole the goods, then they must acquit the defendant as to the other counts of the indictment."

XIV.

That the Court erred in refusing the request of the defendant to instruct the jury as follows:

"If the jury find from the evidence that the

goods were removed from the freight house by the defendant, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, then it is the duty of the jury to acquit the defendant."

XV.

The Court erred in instructing the jury as follows:

"Now, there are five other counts of this indictment. Count two charges the defendant with having in his possession certain goods and chattels, and then describes the goods and chattels. Those goods and chattels are a part of the goods and chattels which are described in the first count. And then it is further alleged by that count that those goods and chattels were a part of and constituted an interstate shipment over the lines of the O. W. R. & N. Company from Detroit to the City of Portland; and it charges the defendant with having those goods in his possession, knowing at the same time that the goods had been stolen from the railroad company or its freight depot while the goods were a part of an interstate shipment."

To which instruction the defendant duly excepted.

XVI.

The Court erred in instructing the jury as follows:

> "The Third Count charges the same thing, but that charge is with reference to another portion of the goods which are described in Count one. And so on with Counts 4, 5 and 6."

To which instruction the defendant duly excepted.

XVII.

The Court erred in instructing the jury as follows:

> "I may say that perhaps the reason why these last counts were so split up was because the goods were found to have been delivered by the defendant, if the testimony so warrants your belief, to different parties, and it came about by the manner in which the goods were handled and disposed of."

To which instruction the defendant duly excepted.

XVIII.

The Court erred in instructing the jury as follows:

> "It is a rule of law that it is permissible, and the prosecutor may join in one indictment a

charge of each offense committed arising out of the same state of facts or series of acts. To make the matter plain, it is often the case that several offenses against the Government may be committed through the doing of the same acts or series of acts, and the Government may indict for all the offenses committed, but each offense must be charged by a separate count, and be separately stated. The principle is well illustrated by the present statute. That statute makes it an offense to steal, take and carry away goods and chattels while in the process of interstate transportation. The same statute makes it also an offense for one to have such goods in his possession knowing them to have been stolen. As a person cannot steal and carry away the goods without having them in his possession, with knowledge of the theft, he may be guilty of both offenses, they arising out of the same series of acts. Now, it was proper for the Government to indict for both offenses but the charge for each offense must be a separate count, and that is what has been done here. While, if the evidence warrants, the defendant may be convicted on two or more of these counts, including the first, but one punishment can be meted out, and that is for the Court and not for the jury. So that while a defendant charged with several offenses arising out of the same acts or series of acts may be convicted of more than one of such offenses, he

can only receive one punishment, which will discharge him of all the offenses."

To which instruction the defendant duly excepted.

XIX.

The Court erred in instructing the jury as follows:

"You may convict upon one or more, or all the counts, or acquit upon one or more, or all the counts. For instance, if you ascertain a reasonable doubt as to whether the defendant stole the property described in Count One, and are convinced that he had the part of such goods described in Count Two, knowing them to have been stolen while in interstate shipment, you should acquit on the first count and convict on the second, or vice versa, if the evidence so convinces you beyond a reasonable doubt. And in this way all the counts will be considered."

To which instruction the defendant duly excepted.

XX.

The Court erred in instructing the jury as follows:

"Now, as to the ingredient of this offense, I can state them to you in a brief way. It con-

sists, in the first place, of stealing, taking away, or carrying away, the property which it is charged the defendant did steal and take and carry away. And further, the property so carried away, must have been taken and carried with the intent on the part of the person taking it to convert the same to his own use. And, second, the party taking the goods must have taken the identical goods which are charged in the indictment. He may have taken part of them, or he may have taken all, but he must have taken some or all of the goods charged in the indictment. He cannot be convicted of taking any other goods than that that was mentioned in the indictment. And he must have taken these goods from a car, or from a warehouse or freight house of the company which has charge of the goods while in transportation, and the goods must have been a part of an interstate shipment.

Goods become a shipment for transportation when they are delivered at a warehouse or freight house and are taken into the possession of the company, and then they continue to be a part of an interstate shipment or of the shipment, while they are being transported from the place where delivered to the place where they are to be turned over to the consignee. Then continue to be a shipment until the goods have been delivered to the consignee. They re-

main in transit yet while the goods are in the warehouse or in the freight house of the shipping company."

To which instruction the defendant duly excepted.

XXI.

The Court erred in instructing the jury as follows:

"As to the second count, the ingredient count is that the defendant must have the goods in his possession, and he must know at the time that the goods had been stolen, and he must know that they were stolen while the goods were in interstate shipment, or being carried from one state into another. And the same rules for determining whether or not the shipment is interstate will apply as I have explained to you formerly."

To which instruction the defendant duly excepted.

XXII.

The Court erred in instructing the jury as follows:

"Now, there is some question made here as to whether the indictment is sufficient in charging that these goods were taken from car No. 10457. The evidence tends to show that the

railroad company itself had taken the goods out of the car and placed them in its freight warehouse, ready for delivery to the consignee. I instruct you, gentlemen of the jury, that it makes no difference whether the goods were in the car at the time they were taken, if they were taken by the defendant, or whether they were in the freight warehouse and not yet delivered to the consignee."

To which instruction the defendant duly excepted.

XXIII.

The Court erred in instructing the jury as follows:

"Another question has been made here, and that is with reference to whether the Oregon-Washington Railroad & Navigation Company was in the operation of its roads while these goods were being transported. The fact is that the Government was at that time in the operation of such railroad lines. It had prior to that time, under the authority of a law of Congress, taken over this line, with a great many others, and was operating the lines for the purposes of the Government. But I instruct you that it makes no difference in this case whether this railroad was being operated by the corporation of the Oregon-Washington Railroad & Navigation Company itself, or was being operated

by the Government. The material thing in the case is, were these goods being transported at the time from the warehouse before delivery to the consignee, then the defendant would be liable if he stole them, if he took them surreptitiously from such warehouse."

To which instruction the defendant duly excepted.

XXIV.

The Court erred in instructing the jury as follows:

"Now, it is claimed on the part of the defendant that he had authority from the United States Rubber Company, which was the consignee of these goods, to obtain the goods from the railroad company and to deliver them at the store of the United States Rubber Company. And in that connection I will say to you that, if the defendant had the authority from the Rubber Company to procure these goods, then it would be, of course, regular for him to go to the warehouse of the company and take the goods in behalf of the Rubber Company, and deliver them to the Rubber Company; but he would have no right to take the goods contrary to the rules of the railroad company. He would have no right or authority by reason of his agency of the Rubber Company, to take these goods away without the consent of the

railroad; and much less would he have any right or authority to steal or carry away the goods surreptitiously, and thereby with intent to convert them to his own use."

To which instruction the defendant duly excepted.

XXV.

The Court erred in instructing the jury as follows:

"If the jury find from the evidence that the goods were removed from the freight house by the defendant, and were not removed surreptitiously and clandestinely or stealthily, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, then it would be the duty of the jury to acquit."

To which instruction the defendant duly excepted.

XXVI.

The Court erred in instructing the jury as follows:

"I instruct you that if you believe from the evidence that the defendant, Harry Nudelman, took the case of rubber tubes described in the indictment from the warehouse referred to in the evidence, he must have taken them in one

of the two ways: either as a theft, or as the agent and expressman of the United States Rubber Company. If you believe that he took them as an expressman under his general authority from the United States Rubber Company to receive freight consigned to it, and not surreptitiously, clandestinely, or stealthily, and that thereafter he formed an intent to convert the case to his own use, then I instruct you that you cannot find him guilty under the first count of the indictment for stealing the case, because the offense would not be one against the laws of the United States."

To which instruction the defendant duly excepted.

XXVII.

The Court erred in over-ruling the motion of the defendant for a new trial upon each count of the indictment, which motion upon each count was based upon the following grounds:

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

XXVIII.

The Court erred in over-ruling the defendant's motion for an order arresting judgment, which motion was based upon the following grounds as to each count in the indictment:

(a) That the indictment does not state sufficient facts to constitute a crime.

(b) That it appears affirmatively of record that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

XXIX.

That the Court erred in entering a judgment of conviction and in sentencing the defendant to confinement in the United States Penitentiary at McNeil's Island, Washington, for a period of 13 months.

WHEREFORE, on account of the errors above assigned, the said judgment ought to have been given for the said defendant and against the United States of America, now the defendant prays that the judgment of said Court be reversed and the sentence herein imposed upon him be set aside, and that this cause be remanded to the said District Court and such directions be given that the above errors may be corrected and law and justice done in the matter.

Dated this 5th day of December, A. D. 1919.

ROSCOE C. NELSON,
JOHN MANNING,
Attorneys for Defendant, Harry Nudelman.

Service acknowledged Dec. 5, 1919.

JOHN C. VEATCH,
Assistant United States Attorney.

[Endorsed]: United States District Court, District of Oregon. Filed Dec. 5, 1919. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

Order Allowing Writ of Error.

Now, at this day, comes the defendant in the above entitled cause by Mr. John Manning, of counsel, and presents to the Court his petition praying for the allowance of a Writ of Error to be issued out of the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of this Court entered in said cause, and moves the Court for an order allowing the said petition:

On consideration whereof, IT IS ORDERED that the Writ of Error issue as prayed for in said petition.

It is further ORDERED that all proceedings in the above entitled District Court be stayed,

superseded and suspended until the final disposition of the Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit, upon the defendant filing an undertaking in the sum of Two Thousand Five Hundred ($2,500.00) Dollars to be approved by the Court.

Dated at Portland, Oregon, this 5th day of December, 1919.

CHARLES E. WOLVERTON,
Judge.

[Endorsed]: United States District Court, District of Oregon. Filed Dec. 5, 1919.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Harry Nudelman, as principal, and Philip Nudelman and Abe Kamusher as sureties, are held and firmly bound unto the United States of America in the penal sum of Two Thousand Five Hundred ($2,500.00) Dollars, for the payment of which,

well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, forever firmly by these presents.

Sealed with our seals and dated and signed this 5th day of December, 1919.

WHEREAS, at the July term, 1919, of the District Court of the United States for the District of Oregon, in a cause therein pending, wherein the United States was plaintiff and the said Harry Nudelman was defendant, a judgment was rendered against the said defendant on the 31st day of July, 1919, wherein and whereby the said defendant was sentenced to be imprisoned in the United States Penitentiary at McNeil's Island, Washington, for a period of thirteen months, and the said defendant has prayed for and obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment and sentence in the aforesaid action, and the citation directing the United States to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days from and after the date of said citation has issued, which citation has been duly served.

NOW, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Harry Nudelman shall appear either in person or by attorney in the said Circuit Court of Appeals for the Ninth Circuit

on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute his writ of error and abide by the orders made by the said United States Circuit Court of Appeals, and shall surrender himself in execution as said Court may direct, if the judgment and sentence against him shall be affirmed, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 5th day of December, 1919.

HARRY NUDELMAN, (Seal)
Principal.
PHILIP NUDELMAN, (Seal)
Surety.
ABE KAMUSHER, (Seal)
Surety.

United States of America,
District of Oregon,—ss.

We, Philip Nudelman and Abe Kamusher, each being first duly sworn, for himself says: That I am a resident and freeholder in the State of Oregon, and that I am worth the sum of Two Thousand Five Hundred ($2,500.00) Dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution.

PHILIP NUDELMAN,
ABE KAMUSHER.

Subscribed and sworn to before me this 5th day of December, 1919.

G. H. MARSH,
Clerk United States District Court, District of Oregon.

Approved Dec. 5th, 1919.

CHAS. E. WOLVERTON,
United States District Judge.

[Endorsed]: United States District Court, District of Oregon. Filed Dec. 5, 1919. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

Bill of Exceptions.

Be it remembered that on the 9th day of June, 1919, at a stated term of said Court beginning and held in Portland, Oregon, before the Hon. Chas. E. Wolverton, District Judge, presiding, the above entitled cause came on to be heard before said Court and a jury impanelled therein; the United States appearing by Mr. John C. Veatch, Assistant United States Attorney for said district, and the defendant

appearing in person and represented by counsel Mr. Roscoe C. Nelson and Mr. Robert F. Maguire.

Whereupon the following proceedings were had, to-wit:

B. L. MacPhee being called on behalf of the Government and being first duly sworn testified substantially as follows:

Q. What do you do, Mr. MacPhee?

A. I am office manager—

EXCEPTION 1.

Whereupon the following proceedings were had:

MR. MAGUIRE: At this time the defendant moves the Court for an order upon the United States to elect whether or not they will prosecute the defendant for the theft of these goods or for having them in possession knowing them to be stolen, upon the ground and for the reason that a man cannot be guilty of the theft and also be guilty in the same district, with having them in possession. Your Honor is probably familiar with the provisions of this act which provide for three separate offenses. One is the theft, the other is having in possession the goods, knowing them to have been stolen, and the third is a separate offense which is transporting these goods in interstate commerce. The law is well settled and is laid down here in a number of decisions, which I will call to your at-

tention, that a person charged with the theft of goods cannot be guilty also of receiving stolen goods.

Which said motion was overruled by the Court and to over-ruling of that motion the defendant was duly and regularly allowed an exception.

Whereupon the said witness testified substantially as follows:

That he was the office manager of the United States Rubber Company; that the United States Rubber Company had received two invoices from the Morgan Wright factory covering the shipment of fifty 32 x 3½ inner tubes, two 33 x 4½ tubes and twenty 34 x 4 tubes, of the approximate value of $306.00; that the defendant during the month of September, 1918, and October, 1918, was employed by the United States Rubber Company as driver in charge of the cartage of its Portland Branch; that the United States Rubber Company was the only concern in the City of Portland distributing United States Rubber Company inner tubes, but that approximately 100 retail dealers in that city had these tubes for sale at retail and that said tubes were kept in cartons, and that inner tubes were not identified by any number placed thereon; that the defendant was the duly authorized agent of the United States Rubber Company to obtain from all freight and express depots all packages of freight or express which were consigned to the

company, and was authorized to take and receive from the railroad any and all shipments consigned to it which it was his duty to bring to the company's warehouse.

O. R. WILEY was thereupon called as witness on behalf of the Government, and being duly sworn, testified substantially as follows: that the shipments of goods in question described in the indictment were not received by the United States Rubber Company; that inner tubes of the size 32 x 3½ in the month of October, 1918, sold for $4.80; that tubes of the size 33 x 4½ sold for about $8.00; that tubes of the size 34 x 4 sold for about $6.65, and never sold as low as $3.00.

O. H. SIMMONS was called on behalf of the Government and being duly sworn testified substantially as follows; that he was gang checker at the O. W. R. & N. freight house, that he checked freight from the way bill, weighed it and sent it to freight house from the cars; that the shipment in question was unloaded at Portland, Oregon, from the car on the 2nd day of October, 1918, by men under his direction and placed in the O. W. R. & N. warehouse at Portland in a pile; that in the usual course of business the teamsters for the consignee would appear at the freight house, go to the delivery office, get a delivery ticket, back his vehicle into the pile and get a checker to check the boxes out to him; that as a rule the checker and the team-

ster would work together in taking the boxes from the pile and putting them on the vehicle; that the witness at the time he had the goods in question taken from freight car and placed in the warehouse was employed by the United States Railroad Administration, and was paid by them, and that the men who took the goods from the car were also employed by the United States Railroad Administration, and that the goods were brought to him from the car by another employee of the United States Railroad Administration, and that the goods were left by him in the warehouse.

FRANK ELLIOTT was thereupon called on behalf of the Government, and being duly sworn, testified substantially as follows: that he is assistant warehouse foreman at the Portland freight sheds of the O.-W. R. & N. line, and that on the 3rd day of October, 1918, the defendant presented to him a delivery receipt for the piece of goods in question, but the delivery clerk was unable to find the goods and reported it to the witness, who on the 9th day of October asked the defendant whether he had seen the goods and was told that the defendant had not.

JOHN A. COLYER was thereupon called on behalf of the Government, and being duly sworn, testified substantially as follows: that during the month of October, 1918, he was employed by the Railroad Administration and the O. W. R. & N. at the freight house in Portland; that the defendant

on the 2nd day of October, 1918, backed his truck up to the door of the warehouse, which door was marked with the name of the United States Rubber Company, to receive such shipments as were there for that corporation and received two shipments, and the witness took his delivery tickets and passed on.

On cross examination he testified substantially as follows: That the defendant came there practically every day to get shipments for the United States Rubber Company, and was the only person who came down to the freight house for them, and was the man authorized to take and carry away all shipments consigned to such company, and that he, the witness, accepted Nudelman's receipts for all the goods shipped to the United States Rubber Company.

FRANK ELLIOTT being recalled, testified that the goods in question reached Portland in G. T. car 10457 (the car designated in the indictment), but that the goods were not stolen from the car, but were removed from the car by the witness and the men under his direction and placed in the warehouse in the space allotted to the United States Rubber Company.

H. N. FRAZER called on behalf of the Government, being duly sworn, testified substantially as follows: That he is a special officer at the freight house of the O. W. R. & N. Company, that he had

a conversation with the defendant some time during the months of November or December, 1918, concerning this shipment of inner tubes, and the defendant said he knew nothing about it. On cross examination the witness testified that the person getting the freight backed his van up there to one of the doors of the freight house in the vicinity of his freight and he takes the freight that is put there in the pile consigned to his firm and puts it upon his van or truck and signs a receipt for it.

The Government then offered evidence tending to prove that the defendant had taken a box approximately three feet in size from the Portland Transfer & Storage Company and that the defendant had sold inner tubes in cartons of the United States Rubber Company to various garage men and retail tire dealers in the City of Portland of the number and size corresponding the shipments alleged to have been stolen and at a price very materially lower than the price at which these goods were sold by the United States Rubber Company to its retail dealers. Whereupon Hyman Cohen was called on behalf of the Government and testified that on or about December 2nd, 1918, the defendant offered to sell him inner tubes of the kind and character sold by the United States Rubber Company; that the witness said he would see if he could sell them and gave the defendant a check for $162.50; that defendant turned over to him a box approximately three feet square containing 72 inner tubes,

and that defendant got this box from the Portland Transfer Company; that the witness tried to sell the tubes but was unable to do so and defendant returned $162.00 of the money paid him and took back the tubes, but Nudelman told him that these tubes were seconds and he purchased them from the United States Rubber Company; that the witness received a letter from the defendant while he was in Hot Springs, Arkansas, in which the defendant desired him to specify or say that the witness had purchased the goods from a name by the name of I. Davie.

On cross examination he was asked if on his return from Hot Springs, Arkansas, he did not inform the defendant that he had consulted with his attorney, Mr. Drake, the United States Commissioner, and if he had not told the defendant not to worry about it at all that his attorney was going to fix the matter up. This conversation the witness denied, but said he had shown Mr. Drake the letter and was advised by Mr. Drake that if he was an innocent man he did not have to be afraid.

EXCEPTION 2.

F. H. DRAKE was thereupon called on behalf of the Government and being duly sworn, testified as follows: that he is an attorney at law, and United States Commissioner for the District of Oregon; that he had had business relations with Mr. Hyman

Cohen; whereupon he was asked what that relation was, to which question the defendant objected upon the ground that it was entirely irrelevant, and that it was improper and immaterial to put one witness on stand, who testifies to certain things, and then call another witness to say that what the first witness said was so, that it was improper and immaterial to any issue in the case.

Whereupon the Court asked the Assistant United States Attorney to what matter the question referred and was informed by the Assistant United States Attorney as follows:

"On cross examination it was brought out by the defendant that Mr. Cohen, one of the witnesses for the Government here, had consulted an attorney on his arrival in Portland. The inference appeared to be drawn from that that Mr. Cohen was afraid of his own connection with this case. I offer to put Mr. Drake on the stand to show his connection.

COURT: Is that all you want to ask Mr. Drake?

MR. VEATCH: Simply his connection; yes.

COURT: You may answer.

To which ruling of the Court the defendant was duly allowed an exception.

Whereupon the witness answered as follows:

"One was in connection involving an automobile.

Another was in connection with a divorce suit. Relative to this particular matter in question, I recall one Sunday morning Mr. Cohen calling me up and stating that he wanted to see me. I told him if it was urgent, he could come out to my house. Mr. Cohen came out to the house and produced a letter and told about——

COURT: I don't think you could go into that matter. You cannot go into the matter of their conversation, but you can show that Mr. Cohen consulted Mr. Drake.

Q. This was on Sunday then, Mr. Drake, that Mr. Cohen consulted you?

A. On Sunday, yes.

Q. Did you see Mr. Cohen after in regard to this case?

A. He met me the next morning and I took him to your office.

Q. Did you have any further consultation, or any dealings with Mr. Cohen regarding this case?

A. No, sir.

To each of which questions the defendant duly objected upon the grounds heretofore recited in this exception, and which said objections were overruled by the Court, and the defendant allowed an exception to the Court's ruling.

EXCEPTION 3.

W. J. ROOPE was thereupon called as a witness on behalf of the Government and being duly sworn, testified substantially as follows:

That he is the manager of the Portland branch of the United States Rubber Company; that the defendant was not an employee of the United States Rubber Company, but that that it had had him under contract to do all its hauling, outcoming and outgoing.

Whereupon the following question was asked:

"Are any of the employees of the United States Rubber Company, Mr. Roope, permitted to do jobbing business of goods that are handled by the Company?"

To which question the defendant interposed the objection that it was irrelevant and immaterial to this case whether the Company can rule or had a rule; that that fact would not make the defendant guilty under a criminal statute; that the company can make rules and he might break them and that fact would affect his criminality under this case.

This objection was overruled by the Court, and the defendant was allowed an exception to the Court's ruling.

The witness thereupon answering the question, testified: "By no means."

Thereafter the witness testified that the box of inner tubes in question never made an appearance in the United States Rubber Company. On cross-examination the witness testified that it was the duty of the defendant, and he was the sole authorized agent of the United States Rubber Company to obtain shipments of freight for that company arriving in Portland, and that it was his duty to go to the freight yards and warehouses and obtain and procure from the railroads and carriers all goods consigned to the United States Rubber Company; and that the shipment of goods in question went astray during the time of the United States Railroad Administration of the carrier.

Whereupon the Government rested its case.

The defendant called as a witness in his behalf MR. C. E. COCHRAN, who being duly sworn testified substantially as follows: that he is a member of the legal profession and assistant secretary of the Oregon-Washington Railroad and Navigation Company, and assistant corporation counsel, and has held such position since the first day of August, 1918; that ever since the month of July, 1918, the lines of railroad which prior to the war were operated by the Oregon-Washington Railroad and Navigation Company have been operated by the United States Railroad Administration; that the United States Government took the lines over pursuant to the proclamation of the President January 1, 1918; that for a time thereafter they were operated by

the Oregon-Washington Railroad and Navigation Company as agent for the Government until the Director General undertook the operation through agents and officers of his own; that about the month of June, 1918, Mr. O'Brien was appointed federal manager for the Government and resigned his official connection with the corporation; that the Oregon-Washington Railroad and Navigation Company had no control over the operation of the lines, or over the freight cars, freight shipments, warehouses, receipts, or the use of or the freight yards known as the O.-W. R. & N. freight yards in the City of Portland, Oregon, since the first day of June, 1918; that the corporation did not collect any freights for shipments taking place after that time, and that it had no power to divert, control, move or stop any shipment over those lines after the first of June, 1918.

On cross-examination he testified substantially as follows: that the lines of railroad in question during federal control were not known as the Oregon-Washington Railroad & Navigation Company's lines, but in order to distinguish them, as between government operation, and that of the corporation, so far as the Oregon-Washington Railroad and Navigation Company was concerned, the Director General called these lines the O.-W. R. & N. lines, which was a sort of trade name for these lines after the first of June, 1918; that the contracts of freight shipment made after that date were not made with

the Oregon-Washington Railroad and Navigation Company, but that the bills of lading bore the stamp of the United States Railroad Administration, and that the Government adopted a name of its own for each one of these railroads; that the Government was a lessee of the railroad and made a contract with the Oregon-Washington Railroad and Navigation Company in which it agreed to pay a rent for the lines.

On re-direct examination he testified that after the First of June, 1918, if there was a shortage in a freight shipment, or if there was a failure to pay freight or an overcharge for freight, the shipper did not have any dealings with the Oregon-Washington Railroad and Navigation Company but with the United States Railroad Administration, and that the corporation had neither custody nor control over any shipment or the physical instrumentalities of commerce after the 1st of June, 1918, and thereupon there was read in evidence a rubber stamp impression appearing upon the bills of lading, way bills theretofore introduced in evidence showing the shipment of the box of inner tubes in question, as follows:

"The United States Railroad Administration, W. G. McAdoo, Director General of Railroads, Oregon-Washington Railroad and Navigation Lines. The above is to be regarded as substituted for the name of the Oregon-Washington Railroad and Naviga-

tion Company where the same appears in this document."

Whereupon the following proceedings were had:

EXCEPTION 4.

It was conceded by the Assistant United States Attorney that the goods described in Count One of the indictment, and the goods described in Counts two, three, four, five and thix thereof, were one and the same.

Whereupon the defendant rested, and moved the Court to require the United States to elect whether to proceed against the defendant upon Count One of the indictment charging him with the theft of the goods, or to proceed against him upon the counts of the indictment charging him with receiving the goods, knowing them to have been stolen, upon the grounds and for the reason that one who steals goods cannot be convicted of the theft of the goods and with having received the same goods knowing them to have been stolen in that the evidence in this cause shows that the goods which it is claimed the defendant stole are the identical goods which it is claimed the defendant received, knowing them to have been stolen.

Thereupon the Court having heard argument of counsel, over-ruled the motion of the defendant, to which action of the Court the defendant duly requested and was allowed an exception.

EXCEPTION 5.

Thereupon the defendant moved the Court to dismiss the indictment against the defendant upon the following grounds and for the following reasons:

As to Count One: That Count One does not state facts sufficient to constitute a crime, in that it does not describe or name the owner, bailee or custodian of the goods;

As to Count Two: That Count Two does not state facts sufficient to constitute a crime, in that it does not allege that the goods in question were, when stolen, in interstate, and in that it does not allege that they were stolen from any railroad car, station house, warehouse, platform, depot, steamboat or vessel of any common carrier; and in that it does not describe or name the owner, bailee, or custodian of the goods sufficiently to identify them;

As to Counts Three, Four, Five and Six: The same grounds and reasons are urged as are urged as to Count Two.

COURT: You are interposing this now in the nature of a motion, a demurrer to the indictment?

MR. MAGUIRE: Yes, your Honor, for the reason that the indictment does not state facts—I could raise that question in the Circuit Court of Appeals; if the indictment does not state facts sufficient to

constitute a crime, it may be raised by motion in arrest of judgment in the Circuit Court of Appeals, or even suggested there for the first time without a motion in arrest of judgment. The sufficiency of the indictment as to a material allegation can be raised at any time in the trial.

COURT: "The evidence shows that these goods were taken, not from the car, but from the depot, the company's warehouse; and it was delivered from the car into this warehouse; so that is covered by the statute."

MR. MAGUIRE: Yes, it is covered by the statute, but it is not covered by 2, 3, 4, 5 and 6 in the indictment.

COURT: I understand this argument does not go to the First Count?

MR. MAGUIRE: This argument does not go to the First Count in the indictment, which I am bringing before your Honor. There is one point which is an exceedingly technical point. To save my client's rights I have placed it in here, but I have not a great deal of confidence in it.

COURT: If these six counts had been tested by demurrer, I should have been inclined to sustain the demurrer, on the ground that there is no direct allegation in the indictment that these goods were stolen, it alleges that the defendant had in his possession these goods, knowing them to have been stolen, but the indictment does not say anywhere

that the goods were stolen while in interstate shipment. There is no direct allegation to that effect. But this question is raised here, after the Government has gone to trial and after the defendant has submitted to the trial, and after the case is ready to go to the jury, and the question here is whether or not this indictment is sufficient to sustain a verdict. That is the question it has to at this time. Then we must look into the indictment to determine whether or not a verdict would be a defense if the defendant were to be again charged and tried. Now, I think a verdict would be a good defense. I think the defendant could well prove former jeopardy, or a former acquittal or a former conviction, as the case might be. In each of these counts the goods are specifically set out, and the verdict must be, if the defendant is convicted, that he had those particular goods in his possession. Such being the case, I see no reason why he could not plead former acquittal or former conviction for an offense charging him again with having had these identical goods in his possession. So I shall over-rule that motion.

I am somewhat in doubt as to whether the Court should instruct the jury that if they find the defendant guilty on the First Count they should then disregard the other five counts; or if they found him guilty on the five counts they should disregard the first. I think, however, that it would be proper to instruct this jury, all of these counts having

grown out of the same transaction, that they may find the defendant guilty or not guilty on each of the charges, and that it will be for the Court, if the defendant is found guilty on more than one of the counts, to administer but one punishment in either event, and that punishment will be a punishment not to exceed the maximum punishment fixed by the statute. I may be wrong about it, but I do not think I am at present."

To which ruling of the Court, the defendant duly asked and was allowed an exception.

EXCEPTION 6.

Thereupon the following proceedings were had:

THE COURT: And with regard to the other question,—I have reference now to the O.-W. R. & N. Railroad being operated by the Government—I do not think that makes any difference in this case, whether it is operated by the O.-W. R. & N. Railroad Company itself, or whether it is operated under lease by the Government. The particular point is that this freight has taken upon itself the characteristic of interstate freight, and that there is enough alleged in the indictment to inform the defendant particularly as to the freight having that characteristic, and that the freight was so carried in interstate commerce over the O.-W. R. & N. Whether it be the O.-W. R. & N. Company or the O.-W. R. & N. Lines, that it was so being carried.

It makes but little difference whether the Government was operating those lines or whether the O.-W. R. & N. Company itself was operating the lines. Hence as to that point, I will overrule the objection heretofore made, and the Court will instruct the jury that it will make no difference as to who was operating the lines at the time."

To which action of the Court in so overruling said motion and in so instructing the jury, the defendant duly asked and was allowed an exception.

EXCEPTION 7.

Whereupon the defendant in due and proper season moved the Court to instruct the jury to find the defendant not guilty as to Count One of the indictment, for the reason that there is a fatal variance between the allegations of the indictment and the proof, in that it appears from the evidence that the goods alleged in the indictment to have been stolen from G. T. car 10457 were not stolen from that car at all, but were removed from that car and placed in the freight shed by employees of the United States Railroad Administration. And it further appears from the evidence that it was not from any railroad car, station house, warehouse, platform, station, depot or freight house in the freight yards of the Oregon-Washington Railroad and Navigation Company, for the reason that it appears from the testimony that the Oregon-Washington Railroad and Navigation Company, at the time the

goods were alleged to have been stolen, was not a common carrier, and that the goods were not being transported over the lines and routes of such company, were not in the custody and control of the company, but were in the freight yards of the United States Railroad Administration, and were transported over the lines and routes of the United States Railroad Administration, and were in the custody and control of the said Railroad Administration.

And also upon the grounds specifically set forth in the motion to dismiss, and that there has been a failure to identify the tubes themselves as a part of the shipment.

And lastly that there is no showing that the case was stolen, and the evidence so far revealed is consistent with the position that the case which is alleged to have been stolen has subsequently been found by the Railroad Administration.

As to Counts 2, 3, 4, 5, and 6, the defendant moved the Court to instruct the jury to find the defendant not guilty upon the several grounds set forth in his motion to dismiss, and for the further ground that the evidence does not support the allegations in the indictment, and that there is no proof of the defendant's guilt thereunder, or under any of them.

The Court denied each, every and all of said requests and to his failure to instruct the jury as requested the defendant asked and was allowed an exception.

EXCEPTION 8.

Whereupon the defendant, in proper time and season, requested the Court to instruct the jury as follows:

I.

If the jury finds from the evidence that the defendant stole, carried away or concealed the goods described in the indictment with intent on his part to convert the same to his own use, and that the goods described in Count One of the Indictment are the same and indentical goods described in Counts Two, Three, Four, Five and Six of the Indictment, then the jury are instructed to acquit the defendant as to Counts Two, Three, Four, Five and Six.

II.

Unless the jury finds from the evidence that the goods described in Counts Two, Three, Four, Five and Six of the indictment are different goods from those described in Count One thereof, then the jury must acquit the defendant as to Counts Two, Three, Four, Five and Six, provided they find from the evidence that the defendant stole the goods described in Count One.

III.

Under the indictment and evidence in this case

the defendant cannot be convicted by the jury of both the crime of stealing the goods and with having them in possession, knowing them to be stolen. If the jury finds from the evidence that the defendant stole the goods, then they must acquit the defendant as to the other counts of the indictment.

IV.

If the jury find from the evidence that the goods were removed from the freight house by the defendant, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, then it is the duty of the jury to acquit the defendant.

Whereupon the Court declined, neglected and refused to instruct the jury as so requested, and to the failure, neglect and refusal of the Court to so instruct, the defendant in due and proper time and manner, requested and was allowed an exception as to each of said requested instructions.

Whereupon the Court instructed the jury as follows:

"Gentlemen of the Jury:

This case having been argued to you by counsel, and you having heard the evidence from the witness stand, it becomes the duty of the Court to give you the rules of law which shall govern you in your investigation or inquiry as to whether a crime has been committed by the defendant as charged in the indictment.

The defendant is indicted under an Act of Congress, which was adopted in 1913, and this act provides that: "Whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels, moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing them to have been stolen," shall be guilty of an offense.

There are two offenses combined in what I have read to you. One is stealing or taking such goods from a car or depot, etc., and the other is for having such goods in one's possession, the party knowing them to have been stolen from such car or from such freight house, the said goods being a part of an interstate shipment.

Now, Gentlemen of the Jury, the indictment charges that on the 2nd day of October, the defendant Harry Nudelman, did unlawfully and feloniously steal, carry away and conceal, with the intent on the part of him, the defendant, to convert to his own use certain goods and chattels (then those goods and chattels are described) from a railroad car, to-wit, car initialed and numbered G. T. 10457, and then and there, at said time and place, being in the freight yards of the Oregon-Washington Rail-

road and Navigation Company, a common carrier; said goods and chattels above described then and there, and at said time and place, being a part of an interstate shipment of freight, namely, a shipment of freight from Morgan and Wright factory, Detroit, Michigan, over the lines of the O.-W. R. & N. Company and connecting carriers to the City of Portland, Oregon.

That is the first count, Gentlemen of the Jury, and I may make it more compact by simply saying that the defendant is charged with having stolen the goods described in the complaint from this railroad car, and that at the time of the taking of such goods they constituted a part of an interstate shipment, which was being carried by the Oregon-Washington Railroad & Navigation Company from Detroit, Michigan, to Portland.

EXCEPTION 9.

Now, there are five other counts of this indictment. Count 2 charges the defendant with having in his possession certain goods and chattels, and then describes the goods and chattels. Those goods and chattels are a part of the goods and chattels which are described in the first count. And then it is further alleged by that count that those goods and chattels were a part of and constituted an interstate shipment over the lines of the O.-W. R. & N. Company from Detroit to the City of Portland; and it charges the defendant with having those

goods in his possession, knowing at the same time that the goods had been stolen from the railroad company or its freight depot while the goods were a part of an interstate shipment.

To the giving of which last instruction the defendant requested and was allowed an exception.

EXCEPTION 10.

Whereupon the Court further instructed the jury jury as follows:

The third count charges the same thing, but that charge is with reference to another portion of the goods which are described in Count One. And so on with Counts 4, 5 and 6.

To the giving of which last instruction the defendant requested and was allowed an exception.

EXCEPTION 11.

Whereupon the Court further instructed the jury as follows:

"I may say that perhaps the reason why these last counts were so split up was because the goods were found to have been delivered by the defendant, if the testimony so warrants your belief, to different parties, and it came about by the manner in which the goods were handled and disposed of."

To giving which instruction the defendant requested and was allowed an exception.

EXCEPTION 12.

Whereupon the Court instructed the jury as follows:

"It is a rule of law that it is permissible, and the prosecutor may join in one indictment a charge of each offense committed arising out of the same state of facts or series of acts. To make the matter plain, it is often the case that several offenses against the Government may be committed through the doing of the same acts or series of acts, and the Government may indict for all the offenses committed, but each offense must be charged by a separate count, and be separately stated. The principle is well illustrated by the present statute. That statute makes it an offense to steal, take and carry away goods and chattels while in the process of interstate transportation. The same statute makes it also an offense for one to have such goods in his possession, knowing them to have been stolen. As a person cannot steal and carry away the goods without having them in his possession, with knowledge of the theft, he may be guilty of both offenses, they arising out of the same series of acts. Now, it was proper for the Government to indict for both offenses, but the charge for each offense must be by a separate count, and that is what has been done here. While, if the evidence warrants, the defend-

ant may be convicted on two or more of these counts, including the first, but one punishment can be meted out, and that is for the Court and not for the jury. So that while a defendant charged with several offenses arising out of the same acts or series of acts may be convicted of more than one of such offenses, he can only receive one punishment, which will discharge him of all the offenses."

To the giving of which said instruction the defendant asked and was allowed an exception.

EXCEPTION 13.

Whereupon the Court instructed the jury as follows:

"You may convict upon one or more, or all the counts, or acquit upon one or more, or all the counts. For instance, if you ascertain a reasonable doubt as to whether the defendant stole the property described in Count One, and are convinced that he had the part of such goods described in Count 2, knowing them to have been stolen while in interstate shipment, you should acquit on the first count and convict on the second, or vice versa, if the evidence so convinces you beyond a reasonable doubt. And in this way all the counts will be considered."

To the giving of which said instruction the defendant asked and was allowed an exception.

Whereupon the Court further instructed the jury as follows:

"The defendant in this case has interposed a plea of not guilty to this indictment. That plea puts in issue all the material allegations of the indictment, and of each count thereof, and it imposes upon the Government the burden of establishing, to your minds beyond a reasonable doubt each and every of such allegations, or each and every ingredient which enters into the offense.

"A person charged with an offense or crime in this country is presumed to be innocent until he has been proven guilty beyond a reasonable doubt, and this presumption abides with the defendant throughout the trial, and until the evidence which has been introduced before you has convinced you beyond a reasonable doubt of the guilt of the defendant."

EXCEPTION 14.

Whereupon the Court further instructed the jury as follows:

"Now, as to the ingredient of this offense, I can state them to you in a brief way. It consists, in the first place, of stealing, taking away, or carrying away, the property which it is charged the defendant did steal and take and carry away. And further, the property so carried away, must have been taken and carried with the intent on the part of the person taking it to convert the same to his own use. And, second, the party taking the goods must

have taken the identical goods which are charged in the indictment. He may have taken part of them, or he may have taken all, but he must have taken some or all of the goods charged in the indictment. He cannot be convicted of taking any other goods than that that was mentioned in the indictment. And he must have taken these goods from a car, or from a warehouse or freight house of the company which has charge of the goods while in transportation, and the goods must have been a part of an interstate shipment.

"Goods become a shipment for transportation when they are delivered at a warehouse or freight-house, and are taken into the possession of the company, and then they continue to be a part of an interstate shipment or of the shipment, while they are being transported from the place where delivered to the place where they are to be turned over to the consignee. They continue to be a shipment until the goods have been delivered to the consignee. They remain in transit yet while the goods are in the warehouse or in the freight house of the shipping company."

To the giving of which instruction the defendant requested and was allowed an exception.

Whereupon the Court further instructed the jury as follows:

"What we mean by interstate shipment is goods

that are shipped through one state into another or from one state into another. It would not answer the purpose if goods were shipped from one point in a state to another point in the same state, because that is not interstate shipment. It is intrastate and not interstate.

"So that all these things must concur in order that the defendant may be found guilty, as charged in the first count."

EXCEPTION 15.

Whereupon the Court further instructed the jury as follows:

"As to the second count, the ingredient count is that the defendant must have the goods in his possession, and he must know at the time that the goods had been stolen, and he must know that they were stolen while the goods were in interstate shipment, or being carried from one state into another. And the same rules for determining whether or not the shipment is interstate will apply as I have explained to you formerly."

To the giving of which instruction the defendant requested and was allowed an exception.

EXCEPTION 16.

Whereupon the Court further instructed the jury as follows:

"Now, there is some question made here as to whether the indictment is sufficient in charging that these goods were taken from car No. 10457. The evidence tends to show that the railroad company itself had taken the goods out of the car and placed them in its freight warehouse, ready for delivery to the consignee. I instruct you, gentlemen of the jury, that it makes no difference whether the goods were in the car at the time they were taken, if they were taken by the defendant, or whether they were in the freight warehouse and not yet delivered to the consignee."

To the giving of which instruction the defendant requested and was allowed an exception.

EXCEPTION 17.

Whereupon the Court further advised the jury as follows:

"Another question has been made here, and that is with reference to whether the Oregon-Washington Railroad and Navigation Company was in the operation of its roads while these goods were being transported. The fact is that the Government was at that time in the operation of such railroad lines. It had prior to that time, under the authority of a law of Congress, taken over this line, with a great many others, and was operating the lines for the purposes of the Government. But I instruct you that it makes no difference in this case whether this

railroad was being operated by the corporation of the Oregon-Washington Railroad & Navigation Company itself, or was being operated by the Government. The material thing in the case is, were these goods being transported at the time from the warehouse before delivery to the consignee, then the defendant would be liable if he stole them, if he took them surreptitiously from such warehouse."

To the giving of which said instruction the defendant duly requested and was allowed an exception.

EXCEPTION 18.

Thereupon the Court further instructed the jury as follows:

"Now, it is claimed on the part of the defendant that he had authority from the United States Rubber Company, which was the consignee of these goods, to obtain the goods from the railroad company and to deliver them at the store of the United States Rubber Company. And in that connection I will say to you that, if the defendant had the authority from the Rubber Company to procure these goods, then it would be, of course, regular for him to go to the warehouse of the company and take the goods in behalf of the Rubber Company, and deliver them to the Rubber Company; but he would have no right to take the goods contrary to the rules of the railroad company. He would have no

right or authority by reason of his agency of the Rubber Company, to take these goods away without the consent of the railroad; and much less would he have any right or authority to steal or carry away the goods surreptitiously, and thereby with intent to convert them to his own use."

To the giving of which said instruction the defendant duly and properly requested and was allowed an exception.

EXCEPTION 19.

Whereupon the Court instructed the jury as follows:

"If the jury find from the evidence that the goods were removed from the freight house by the defendant, and were not removed surreptitiously and clandestinely or stealthily, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, then it would be the duty of the jury to acquit."

To the giving of which instruction the defendant duly requested and was allowed an exception.

EXCEPTION 20.

Whereupon the Court further instructed the jury as follows:

"I instruct you that if you believe from the evi-

dence that the defendant, Harry Nudelman, took the case of rubber tubes described in the indictment from the warehouse referred to in the evidence he must have taken them in one of two ways: either as a theft, or as the agent and expressman of the United States Rubber Company. If you believe that he took them as an expressman under his general authority from the United States Rubber Company to receive freight consigned to it, and not surreptitiously, clandestinely, or stealthily, and that thereafter he formed an intent to convert the case to his own use, then I instruct you that you cannot find him guilty under the First Count of the indictment for stealing the case, because the offense would not be one against the laws of the United States."

To which instruction of the Court the defendant requested and was allowed an exception.

Whereupon the following proceedings were had: The Court further instructed the jury as follows:

"Now, gentlemen, I have said to you that the burden of proving this case was cast upon the United States Government, and that that burden required the Government to prove to your satisfaction that the crime had been committed beyond a reasonable doubt, and I will explain to you what is meant by a reasonable doubt. It is a little hard to define it; but it is not every captious, whimsical doubt, or every doubt that a person might raise for

the purpose of getting rid of a subject. It is a thing of substance. It is such a doubt that in the consideration of this case as you pass along the line, as the testimony has been offered here before you, at some point would cause you to hesitate and to be doubtful whether or not the truth shows the defendant guilty. In other words, you must be satisfied to a moral certainty, taking into consideration all the evidence in the case, both pro and con, that the defendant did commit the crime or the offense charged in this indictment. You, gentlemen of the jury, are judges of the effect of the testimony. The Court gives you the law, and you take the law from the Court implicitly and apply it; but when it comes to ascertaining and determining what the testimony proves in the case, that is a function which the law devolves upon you alone, and you must determine that for yourselves.

A witness is presumed to speak the truth, but that presumption may be overcome by the manner in which he testifies and by the character of his testimony, or by testimony which may go to his motives, or by contradictory evidence.

A person found to be incorrect in one particular may be distrusted in all. And you may take into consideration furthermore the defendant (witness) may have in the case and the testimony that he gives and determine from all that what the credibility of the witness is. And having determined the

credibility of the witnesses, you may then determine upon the whole what your verdict shall be in this case, as to whether the defendant is innocent or guilty.

"The defendant himself has not taken the witness stand. That is a right of his; he might have taken the witness stand if he desired, or he might refrain from going upon the witness stand; but the rule of law is, and the statute so prescribes that where a person does not go upon the witness stand, the jury shall not take that incident or fact as a fact against him in the trial, and that the case must be determined wholly upon the evidence as before you without drawing any inference from the fact that the defendant himself did not go upon the witness stand. What the Court may have said during any time during the continuance of this trial from which you might infer that the Court had an opinion or judgment as to the facts proven, you will disregard, because that is a function of yours and not the Court's."

And the foregoing instructions are all of the instructions given by the Court to the jury at said trial.

Whereupon the jury duly retired to consider their verdict and thereafter returned a verdict into court finding the defendant guilty as charged in the indictment as to Counts one, two, three, four, five and six, which said verdict was duly filed.

Thereafter the defendant moved the Court as follows:

"Comes now the defendant in the above entitled cause by R. C. Nelson and Winter & Maguire, his attorneys, and moves the Court for a new trial therein, upon the following grounds and for the following reasons:

As to the Verdict of Count One of the Indictment:

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

As to the Verdict Upon Count Two of the Indictment.

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

As to the Verdict Upon Count Three of the Indictment.

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

As to the Verdict Upon Count Four of the Indictment:

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

As to the Verdict Upon Count Five of the Indictment:

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

As to the Verdict Upon Count Six of the Indictment:

(a) That the evidence was insufficient to justify the verdict.

(b) That the verdict is against and contrary to the evidence.

(c) That the verdict is contrary to law.

(d) That the Court committed error in the trial on said cause, to which error the defendant duly excepted.

Thereafter the Court heard the arguments of counsel upon said motion and overruled the same, to which action of the Court the defendant, Harry Nudelman, was duly allowed an exception.

Thereafter the defendant, Harry Nudelman, moved the Court for an arrest of judgment as follows:

Comes now the defendant by R. C. Nelson and Winter & Maguire, his attorneys, and moves the Court for an order arresting the judgment in the foregoing cause, upon the following grounds and for the following reasons:

As to Count One of the Indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

As to Count Two of the Indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

As to Count Three of the Indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

As to Count Four of the Indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

As to Count Five of the Indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

As to Count Six of the indictment:

(a) That Count One of the indictment does not state facts sufficient to constitute a crime.

(b) That it appears affirmatively of records that there is a fatal variance in the proofs between the allegations of the indictment and the evidence.

Thereafter, the Court entered a judgment of conviction and sentenced the defendant, Harry Nudelman to confinement in the U. S. Penitentiary at McNeill's Island, Washington, for a period of thirteen months.

And it is certified that the foregoing is all of the testimony, evidence, records and exceptions in said cause material to the exceptions herein noted.

And thereafter and within the time allowed by the Court the defendant, Harry Nudelman presented this his bill of exceptions, which is hereby allowed.

CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Bill of Exceptions accepted this 3rd day of November, 1919.

JOHN C. VEATCH,
Assistant United States Attorney.

[Endorsed]: United States District Court, District of Oregon. Filed Nov. 3, 1919. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

Stipulation as to Record.

It is hereby stipulated by and between the United States of America, by John C. Veatch, Assistant United States Attorney for the District of Oregon, and Harry Nudelman, the defendant, by Roscoe C. Nelson and John Manning, his attorneys, that the following documents, papers and records in the case of the United States of America vs. Harry Nudelman shall be included in the transcript of record in the said cause, and that the same are all the necessary documents, papers and records to be con-

sidered in reviewing the said case on writ of error, to-wit:

Indictment,
Bill of Exceptions,
Assignments of Error,
Petition for Writ of Error.
Order Allowing Writ of Error,
Citation,
Writ of Error,
Arraignment of Plea.
Impaneling of Jury,
Verdict,
Judgment,
Bond.

It is further hereby stipulated between the respective parties hereto that the foregoing printed record now tendered to the Clerk of the above entitled Court for his certificate, and filed in the above cause, is a true transcript of the record in said cause, and that the said Clerk may certify said transcript to the United States Circuit Court of Appeals for the Ninth Circuit, without comparing the same with the original record which is on file herein.

Dated this 13th day of December, 1919.

JOHN C. VEATCH,
Attorney for Plaintiff.
ROSCOE C. NELSON,
JOHN MANNING,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 13, 1919. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY NUDELMAN,
Defendant.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed transcript of record on writ of error in the case of Harry Nudelman, plaintiff in error, vs. United States of America, defendant in error, is a true transcript of the record in said cause in said Court. This certificate is made without comparing the said transcript of record with the original record in said cause, pursuant to the stipulation of the parties therein that this record may be certified to by me to be a true copy, without comparison.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court at Portland in said District this —— day of December, 1919.

Clerk.

No. 3431.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY NUDELMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

JOHN MANNING and ROSCOE C. NELSON, both of Portland, Oregon, Attorneys for Plaintiff in Error.

LESTER W. HUMPHREYS, United State Attorney for Oregon, and JOHN C. VEATCH, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Defendant in Error.

LIST OF CASES CITED IN THIS BRIEF.

No. 3434.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY NUDELMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

The indictment against the defendant, Harry Nudelman, contains six counts. The first charges that the defendant did steal, carry away and conceal, with the intent to convert to his own use, certain rubber inner tubes for automobiles, from a certain railroad car numbered "G. T. 10457," which was at the time in the freight yards of the Oregon-Washington Railroad & Navigation Co., a common carrier, in Portland, Oregon. The said goods at the time being a part of an interstate shipment of freight from a factory at Detroit, Michigan, to the United States Rubber Company at Portland, Oregon, over the lines of the aforesaid Railroad Company and connecting carriers to the grand jurors unknown, and such goods being in the custody and control of the said Railroad Company. The other five counts each charge that the defendant unlawfully had in his possession various portions of the same goods alleged to have been stolen by the defendant in the first count; and further alleges that the defendant knew them to have been stolen, and that the said goods were a part of an interstate shipment of freight from the aforesaid consignor to the aforesaid consignee over the lines of the said Railroad Company. There is no allegation in any of these last five counts, charging that the said goods had been stolen while in interstate commerce (Trans. pp. 5 to 10).

The defendant was convicted after a trial upon all of the said counts, and was thereafter sentenced upon the verdict to thirteen months imprisonment in the Penitentiary (Trans. pp. 13 and 14).

At the opening of the case the Court denied a motion of the defendant to require the Government to elect whether it would prosecute the defendant for stealing the goods, or for having them in his possession, knowing them to be stolen, but the motion was denied. Thereafter evidence was offered by the Government tending to show that certain goods of the description alleged in Count One, were shipped by the aforesaid consignor to the United States Rubber Company at Portland, Oregon, and arrived in Portland on October 2nd, 1918; that at the time the defendant was a driver for the said consignee, in charge of its cartage, and was the duly authorized agent of the said Company to obtain from all freight and express depots all packages of freight or express which were consigned to the Company, and was authorized to take and receive for the Company any and all shipments consigned to it, which it was his duty to bring to the Company's warehouse (Transcript, page 41); that in the usual course of business, the teamsters taking goods from the freight house where the goods in question were stored, would get a delivery ticket from the office, back their vehicles to the pile where the goods were stored and get a checker to

check the boxes out to them; that the goods, while in interstate commerce, were not in the custody of the Oregon-Washington Railroad & Navigation Company, but in the custody of the United States Railroad Administration; that the goods mentioned in the indictment were not stolen from the car described in the indictment, but were removed by a certain railroad employee in the course of his work from the car to the freight house, in the space alloted to the United States Rubber Company. (Transcript, page 44).

Further evidence was offered tending to prove that on October 3rd, 1918, the defendant presented to the station warehouse foreman a delivery receipt for the goods in question, but the delivery clerk was unable to find same; and that on the 9th of October the defendant stated that he had not seen the goods. Evidence was then offered tending to show that the defendant had thereafter sold various inner tubes in cartons of the United States Rubber Company, to a large number of dealers in Portland, of the number and size corresponding to the goods alleged to have been stolen, at a materially reduced price (Trans. pg. 45).

At the close of the evidence the defendant also called the Court's attention to the fact that the indictment, or any count thereof, did not state a crime, but the defendant's contentions in this behalf were overruled. (Transcript, page 54). A motion

was also made to dismiss the case upon the ground that there had been a failure to identify the tubes shown to have been in the possession of the Railroad Company, as being the identical tubes which the proof tended to show were afterward sold by the defendant. But this motion was over-ruled. (Transcript, page 59).

At the close of the case the defendant also requested the Court to direct a verdict of not guilty, on the ground that there was a fatal variance between the indictment and proof in this respect; that the indictment alleged that the goods in question were stolen from a certain railroad car, and that the goods were in the custody of the Oregon-Washington Railroad & Navigation Co., whereas it appeared in the evidence, without contradiction, that the goods were removed from the said car by the employees of the Railroad and placed in the freight sheds of the said Railroad for delivery to the consignee; and it further appeared that the goods were never at any time in the custody of the Oregon-Washington Railroad & Navigation Co., but were in the custody of the United States Railroad Administration. But the said motion was overruled. (Transcript, page 58).

The defendant also requested the Court to instruct the jury that if it found from the evidence that the goods were removed from the freight house by the defendant, and that at said time the

defendant was the duly authorized agent and representative of the consignee of the goods, that it was the duty of the jury to acquit. This instruction being requested on the theory that as the evidence tended to show that the defendant was the agent of the consignee to obtain goods from the freight depot, he could not be guilty of larceny of the same; but this requested instruction was not given, except in a modified form inconsistent with defendant's theory. (Transcript, pages 61 and 71).

Instructions were given by the Court inconsistent with the defendant's contentions, above outlined, to which the defendant duly excepted. These are fully and definitely referred to in the Specifications of Error, and Argument.

The above, we believe, is a sufficient statement of the nature of the case and the errors complained of by the plaintiff in error.

SPECIFICATIONS OF ERROR AND ARGUMENT.

I.

The Defendant could not be guilty of stealing property and at the same time be guilty of receiving such stolen property, knowing it to have been stolen.

When the first witness for the Government was

put on the stand, the defendant, by his counsel, moved the Court for an order requiring the Government to elect whether it would prosecute the defendant for the theft of the goods as charged in Count One, or for receiving them, knowing them to have been stolen, as charged in the other counts of the indictment. This motion was over-ruled. (Trans., page 40, Assignment I). It was conceded by the United States Attorney that the goods described in the first count were the same as the goods described in the other counts. (Transcript, page 53).

At the conclusion of the testimony, the defendant again moved the Court to require the United States to elect whether it would proceed against the defendant upon Count One, charging the theft of the goods, or upon the counts charging him with receiving the goods, knowing them to have been stolen, which motion the Court over-ruled. (Trans., page 53, Assignment IV).

The defendant requested the following instructions, which were denied:

> "If the jury finds from the evidence that the defendant stole, carried away or concealed the goods described in the indictment with intent on his part to convert the same to his own use, and that the goods described in Count One of the Indictment are the same and identical

goods described in Counts two, three, four, five and six of the indictment, then the jury are instructed to acquit the defendant as to Counts two, three, four, five and six."

"That unless the jury finds from the evidence that the goods described in Counts two, three, four, five and six of the indictment are different goods from those described in Count one thereof, then the jury must acquit the defendant as to Counts two, three, four, five and six, provided they find from the evidence that the defendant stole the goods described in Count one."

"Under the indictment and evidence in this case, the defendant cannot be convicted by the jury of both the crime of stealing the goods and with having them in his possession knowing them to be stolen. If the jury finds from the evidence that the defendant stole the goods, then they must acquit the defendant as to the other counts of the indictment."

(Trans., page 60, Assignments XI, XII and XIII.)

The Court instructed the jury on this point as follows:

* * * "As a person cannot steal and carry away the goods without having them in his possession, with knowledge of the theft, he may be

guilty of both offenses, they arising out of the same series of acts. Now, it was proper for the Government to indict for both offenses, but the charge for each offense must be a separate count, and that is what has been done here. While, if the evidence warrants, the defendant may be convicted on two or more of these counts, including the first, but one punishment can be meted out, and that is for the Court and not for the jury. So that while a defendant charged with several offenses arising out of the same acts or series of acts may be convicted of more than one of such offenses, he can only receive one punishment, which will discharge him of all the offenses."

"You may convict upon one or more, or all the counts, or acquit upon one or more, or all the counts." * * * *

(Trans., pages 65 and 66, Assignments XV, XVI, XVII, XVIII and XIX).

We believe the Court erred to the prejudice of the defendant in allowing the said indictment to go to the jury on all of the counts, and that the Court should have required the Government to elect whether it would proceed upon the first count, or the other five counts.

In the case of Halligan vs. Wayne, 179 Fed., 112, (9th Cir.), which was a habeas corpus proceeding,

it appeared that Wayne had been convicted of burglary of a post office, and also of larceny of certain postage stamps from the said post office. Wayne was convicted on both counts, given a sentence as to each count. The Appellate Court held that there could be but one conviction, and in approving the law as stated in 3 Enc. of Pl. & Pr., 785 and 791, said:

> "But the verdict and the conviction in such a case cannot be for both the burglary and the larceny, though they may be for either offense singly. When both offenses are united in one indictment, it is permissible to convict for either offense without the other."
>
> "But there cannot be a conviction for both offenses. There may, however, under such an indictment, be found a general verdict of guilty; but on this verdict there can be but one sentence, that for the burglary alone, and not for both burglary and larceny."

To the same effect was Stevens vs. McClaughry, 207 Fed. 19; and Munson vs. McClaughry, 198 Fed. 72.

In the matter of Hans Neilson, 131 U. S. 176, the Supreme Court held that an indictment for unlawful co-habitation was a bar to a prosecution for adultery during a period covered by the indictment.

"One can not be at the same time a thief and a receiver of the stolen property."

25 Cyc. 59.

State vs. Honig, 78 Mo. 249.

State vs. Larkin, 49 N. H. 39.

We realize that it is ordinarily within the discretion of the Court to require the prosecutor to elect between offenses, but in this case where it plainly appears that the defendant could not be guilty of both the crime of stealing certain property and receiving the same, knowing it to have been stolen, and the matter was called to the attention of the Court at the proper time before any evidence was introduced by the Government, the Court should have required the Government to elect which crime it would proceed upon. The Court's failure so to do deprived defendant of a substantial right.

II.

The Indictment Does Not State a Crime.

Assignments V, IX, XV, XVI and XIX.

At the conclusion of the testimony the defendant moved the Court to dismiss the indictment against the defendant for the reason that the same did not state facts sufficient to constitute a crime against the defendant. As to Count One of the Indictment, it was urged that the indictment was fatally defic-

ient in that as to the goods alleged to have been stolen, the indictment did not name or describe the owner, bailee or custodian of said goods. As to the other counts it was urged that each of them failed to allege that the goods in question were, when stolen, in interstate commerce; and further that the indictment does not allege that said goods were stolen from any railroad car, warehouse, station house, platform, depot, steamboat or vessel of any common carrier; and further, because each of said counts do not describe or name the owner, bailee or custodian of the said goods sufficient to identify them. This motion was over-ruled. (Trans., pages 54-57, Assignment V.)

The defendant also moved the Court to instruct the jury to find the defendant not guilty upon each of the said counts, which motion was over-ruled. (Trans., page 59, Assignment IX.)

Exception was also taken to the instructions of the Court to the jury, in which the Court stated that said counts were sufficient. (Trans., pages 64, 65 and 66, Assignments XV, XVI and XIX.)

An indictment or information for larceny, which contains no allegation of the ownership of the stolen property, is subject to a demurrer. The defect is not cured by a verdict, and the motion for arrest of judgment should be sustained.

18 Standard Proc. 758.

In the case of People vs. Hanselman, 76 Calif., 460; 9 Am. St. Rep. 238, the Court said:

> "And under all definitions of larceny found in the books, the ownership of the property averred to have been stolen in some other person than the one charged with stealing it is an essential element of the crime. The code of this state provides that it must be the property 'of another.' And all the authorities are concurrent to the point that this essential part of the crime must be stated in the indictment: 2 Archbold's Criminal Law, 357 et seq.; 2 Russell on Crimes, 107. To disregard this firmly fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation."

As shown above, Counts Two to Six, inclusive, of the indictment contain no allegation that the goods received by the defendant had been stolen while in interstate commerce, or were stolen from any of the places enumerated in the statute. This is a vitally essential allegation and without it the Federal Courts could not have jurisdiction. These counts of the indictment do not go further than to simply allege that the defendant received certain stolen goods, which were in interstate commerce, but do not show that they were stolen while in such interstate commerce.

For these reasons we believe that the Court, upon the request of the defendant, should have granted the motion of the defendant to dismiss the indictment, and that its failure to do so was error prejudicial to the defendant.

III.

There was a fatal variance between the allegations of the indictment and the proof.

Assignments VI, X, XX, XXII, XXIII, XXVII and XXVIII.

Count One of the indictment alleged that the goods were stolen from a railroad car, to-wit: a car initialed and numbered "G. T. 10457," which was at the time in the freight yards of the Oregon-Washington Railroad & Navigation Co., a common carrier, in Portland, Oregon, and that the goods at the time of being stolen were in the custody and control of the Oregon-Washington Railroad & Navigation Co. (Trans., pages 6-10.)

The evidence offered by the Government tended to show that the goods were taken by the defendant from the warehouse of the United States Railroad Administration at Portland. There was no evidence tending to show that the defendant had stolen the goods from the said railroad car, or that the goods were ever in the possession, custody or control of

the Oregon-Washington Railroad & Navigation Co. (Trans., pages 42-44, 50-52.)

At the close of the evidence the defendant moved the Court to instruct the jury to find the defendant not guilty, because of the variance between the indictment and proof as above stated. But said motion was denied. (Trans., page 58, Assignments VI and X.)

The Court instructed the jury as follows:

> "Now, there is some question made here as to whether the indictment is sufficient in charging that these goods were taken from car No. 10457. The evidence tends to show that the Railroad Company itself had taken the goods out of the car and placed them in its freight warehouse, ready for delivery to the consignee. I instruct you, gentlemen of the jury, that it makes no difference whether the goods were in the car at the time they were taken, if they were taken by the defendant, or whether they were in the freight warehouse and not yet delivered to the consignee."
>
> "Another question has been made here, and that is with reference to whether the Oregon-Washington Railroad & Navigation Co. was in the operation of its roads while these goods were being transported. The fact is that the Government was at the time in the operation

> of such railroad lines. It had prior to that time, under the authority of a law of Congress, taken over this line, with a great many others, and was operating the lines for the purpose of the Government. But I instruct you that it makes no difference in this case whether this railroad was being operated by the corporation of the Oregon-Washington Railroad & Navigation Co. itself, or was being operated by the Government. The material thing in the case is, were these goods being transported at the time from the warehouse before delivery to the consignee, then the defendant would be liable if he stole them, if he took them surreptitiously from such warehouse."

to which instructions the defendant duly excepted. (Trans., pages 70-71, Assignments XXII and XXIII.)

The said variance above referred to was also urged upon the Court by the defendant in his motion for a new trial, and motion in arrest of judgment, both of which motions were over-ruled. (Trans., pages 76-80, Assignments XXVII and XXVIII.)

We believe that this constitutes a material and fatal variance and the Court erred in allowing the case to go to the jury as these essential allegations of the indictment were not proven.

We have contended that the indictment is not

sufficient, in that there is no allegation of ownership of the goods in question in the indictment. Conceding, for the purpose of the argument of the question now discussed, the sufficiency of the indictment in this respect, the only possible allegation of ownership would be the allegation that the goods were in the custody and control of the Oregon-Washington Railroad & Navigation Co.

Wharton, in his comprehensible work on criminal law, says:

> "To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or especial property of the alleged owner, provided that such owner be not technically the defendant."
>
> 2 Wharton's Crim. Law 1394 (11th Ed.).
>
> "The property of the stolen goods must be in the rightful owner, general or especial: If the owner be misnamed; if the name thus stated be not either his real name or the name by which he is usually known; or if it appear that the owner of the goods is another and different person from the person named as such in the indictment, the variance will be fatal and the defendant, at common law, must be acquitted."
>
> 2 Wharton's Crim. Law 1398 (11th Ed.).

In the Standard Ency. of Evidence, Vol. 13, page 715, on the subject of variance, it is stated:

> "Allegations of an indictment, descriptive of the ownership and character of the property, must be proved as charged."

In 25 Cyc., page 84, subject Larceny, the rule is stated:

> "If the place of the commission of an offense enters into and is material for the description of the offense, it must be exactly alleged and proved."

The case of **Johnson vs. State, 111 Ala., 66,** illustrates our contention. The defendant was indicted for burglary upon the charge that he broke into a railroad car, the property of the Alabama Mineral Railroad Co. The proof tended to show that the railroad car was standing upon a track in the possession of the Alabama Mineral Railroad Co., but was the property of the Louisville & Nashville Railroad Co. The Court held upon writ of error that this was a fatal variance and reversed the case.

Moynhan vs. People, 3 Colo., 367, was a homicide case wherein the indictment alleged the name of the deceased to be Patrick Fitz Patrick, and the proof showed the name of the deceased to be Patrick Fitzpatrick. The Court held this variance to

be fatal. The Court in its opinion said, at pages 373-374:

> "It follows, therefore, that the indictment failed of its office. It afforded the prisoner no information as to the person with whose death he is charged. If the result had been favorable to him he could not have availed himself of this record to bar another indictment, without producing evidence **aliunde** to identify the person named as the murdered man, in the new indictment, with the person who appears in that character in the present one; a burden, which neither the grand jury, nor the prosecutor, nor the courts have any power to impose.
>
> It will not suffice to say that the prisoner has not been misled. In the present state of the law we are not permitted to say this. It is presumed that every accused person is both innocent and ignorant of the offense alleged in all its substance and detail; and, therefore, it is that the law requires a specific charge of the whole matter, with all its particulars."

An averment of a sum of money obtained by false pretense is not supported by proof of obtaining a Certificate of Deposit of a bank.

> Commonwealth vs. Howe, 132 Mass. 250 at 258.

The case of **Commonwealth vs. Stone, 152 Mass.** 498, is also illustrative of our contention. In this case the residence of a person, whose testimony was suborned, was not proved as alleged in the indictment. The Court said, at page 499:

> "It has been held that where a person necessarily mentioned in an indictment is erroneous-described as George E. Allen instead of George Allen, or Nathan S. Hoard instead of Nathan Hoard, or the Boston and Worcester Railroad Company instead of the Boston and Worcester Railroad Corporation, the variance is fatal, unless it shall be shown that the person so named is known by the one name as well as the other, as the correct description of such person is necessary to identify the offense. Commonwealth v. Shearman, 11 Cush. 546. Commonwealth v. Pope, 12 Cush. 272. Commonwealth v. McAvoy, 16 Gray, 235. Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, the circumstances of the description are to be proved, as they are made essential to its identity. Thus, in an indictment for stealing a horse, its color need not be mentioned; but if it is stated, it is made descriptive of the animal, and a variance in the proof of its color is fatal. 1 Greenl. Ev. Sec. 65. 3 Stark. Ev. (4th Am. Ed.) 1530. Commonwealth v. Wellington,

7 Allen, 299. State v. Noble, 15 Maine, 476. Rex v. Raven, Russ. & Ry. 14."

In **Davis vs. People, 19 Ill.,** 73, a homicide case wherein the indictment alleged the name of the deceased to be Seth Taylor and the proof only showed that a man named Taylor was murdered, there was held to be a fatal variance.

In **State vs. Crogan,** 8 **Iowa** 523, the indictment charged the defendant with occupying a certain building on a certain described lot, for gambling purposes. The Court refused a requested instruction that the situation of the premises must be proved as alleged, and if not thus proven, the jury must acquit. The appellate court in holding that such instruction should have been given said:

> "In some instances, where the place is stated in the indictment as a matter of local description, and not as venue, it is necessary to prove it as laid, although it need not have been stated; and the case before us is one of this class. Roscoe's Cr. Ev., 110-11; Wharton's Cr. Law, 280; People v. Slater, 5 Hill, 401; same v. Honeyman, 3 Denio, 121; Shaw v. Wrigley, 2 East., 500; 2 Stark. Ev., 1571; 2 Russ., 800-1."

Hamilton vs. State, 60 Ind. 193; 28 Am. Rep. 653.

State vs. Sherburne, 59 N. H. 99.

We believe that the variances herein complained of are not of a formal nature such as come within the provisions of Section 1025 U. S. R. S. The allegation as to the place from where the goods were stolen was essential to the description of the offense. The allegation of the custody of the goods was also an essential averment. There was a variance between the allegation and the proof in both cases. Inasmuch as the law clothed the defendant with the presumption of innocence, as said in the case of **Monyhan vs. People** above cited, he is presumed not only to be innocent but to be ignorant of the offense in all its details. If it appears that the proof does not conform to the allegations in these two important details of the crime charged, it can not be said that he was not misled where the indictment informed him that he is to be charged with stealing from a railroad car in the custody of the Oregon-Washington Railroad & Navigation Co., and the proof shows that such is not the fact.

IV.

There was no proof sufficient to go to the jury showing that the tubes in the possession of the defendant were the same tubes as those claimed to have been stolen.

Assignments VII and VIII.

The indictment alleged the theft of 72 rubber

inner tubes for automobile tires, of three different sizes. (Trans., page 5.) The proof showed that a consignment of goods to the United States Rubber Co. of this description was unloaded at Portland, Oregon, from the car on October 2nd, 1918, by railroad employees, and placed in the warehouse at Portland in a pile; and also that the defendant was a teamster for the consignee and accustomed to go to the warehouse to obtain freight for his employer. (Trans., pages 42 and 43.) On October 3rd, 1918, the defendant presented to the warehouse foreman a delivery receipt for the goods in question, but the clerk was unable to find the goods, and on October 9th, 1918, asked the defendant whether he had seen the goods, and the defendant replied he had not. (Trans., page 43.) On October 2nd, 1918, the defendant received two shipments for the United States Rubber Co., and the railroad employee took his delivery tickets for same. (Trans., page 43.)

In November or December, 1918, a special officer of the Railroad Administration inquired of the defendant concerning this shipment of tubes, and the defendant said he knew nothing about it. (Trans., page 45.)

Evidence was also offered tending to prove that the defendant had taken a box approximately three feet in size, from the Portland Transfer & Storage

Co. and had sold inner tubes in cartons of the United States Rubber Co. to various garage men and retail tire dealers in Portland, of the number and size corresponding to the shipment alleged to have been stolen, at a price materially lower than the price at which they were sold by the United States Rubber Co. (Trans., page 45.)

The United States Rubber Co. was the sole distributor of these tubes in Portland, but approximately 100 dealers in that city had these tubes for sale at retail, and the tubes were kept in cartons and were not identified by any number placed thereon. (Trans., page 41.)

A witness named Hyman Cohen, testified that on December 2nd, 1918, the defendant offered to sell him inner tubes of the kind sold by the United States Rubber Co.; that the defendant turned over to him a box approximately three feet square, containing 72 inner tubes, and that defendant got this box from the Portland Transfer & Storage Co. That witness was unable to sell the tubes and returned them to defendant; that witness paid $162.50 to the defendant, who, upon return of the tubes, paid back the money; that defendant told him that these tubes were seconds and he purchased them from the United States Rubber Co. That witness has received a letter from defendant in which defendant desired him to specify and say

that witness had purchased the goods from a man named I. Davie. (Trans., pages 45-46.)

This was all the evidence tending to connect the defendant with the theft of these tubes.

At the close of the case the defendant moved to dismiss the case because there had been a failure to identify the tubes themselves as a part of the shipment; that there was no showing that the case was stolen, and the evidence so far revealed was consistent with the position that the case, which was alleged to have been stolen, had subsequently been found by the Railroad Administration. (Trans., page 59, Assignments VII and VIII.)

In order to invoke the presumption of guilt, from the possession of property alleged to have been stolen, the property found in the possession of the defendant must be identified as the property which was stolen.

8 Stand. Ency. of Ev. 105.

In the case of State vs. Payne, 6 Wash. 563; 34 Pac. 317, the Court said:

> "Until the property found in the possession of the defendant has been identified as the property of the alleged owner, and as having been stolen, its possession calls for no explanation whatever. It is the possession of property shown to have been stolen that raises a

presumption of the guilt of the possessor, not a possession of like property merely."

In the case of Hamilton vs. State, 60 Ind. 193; 28 Am. Rep. 653, it was held that an indictment for larceny of "Lawful money of the United States" is not supported by proof of the larceny of money merely; inasmuch as a large proportion of the circulating medium are national bank notes, which are in no sense money of the United States, and the evidence did not show that the money stolen did not consist of such bank notes.

In the case of Kaiser vs. State, 35 Neb. 704, the Court said, at page 706:

"The case, therefore, is this: Gallagher, while intoxicated, lost a sum of money. Soon thereafter the plaintiff in error is proven to have been in possession of a sum of money corresponding in kind to that lost by Gallagher, and under circumstances tending to show that he did not come by it honestly. Circumstantial evidence to warrant a conviction should be of such a convincing character as to prove beyond a reasonable doubt that the accused, and no other person, committed the crime with which he is charged. (Walbridge v. State, 13 Neb. 236; Bradshaw v. State, 17 Id. 147). Here, aside from the possession by the plaintiff in error of an unusual sum of money, there is no

proof whatever to connect him with the larceny, if we assume that the money was in fact stolen from Gallagher, an assumption not fully warranted by the evidence." * * * * "While the evidence was admissible as tending to establish the guilt of the accused, and while it may be said to raise a strong presumption that he did not come by the money honestly, it is certainly insufficient to exclude the theory of his innocence of the crime of larceny and to establish his guilt thereof beyond a reasonable doubt."

In State vs. Nesbit, 4 Idaho 548; 43 Pac. 66, which was a case in which the defendant was charged with the crime of larceny of a certain sum of money, the Court said, at page 556:

> "Conceding that there is circumstantial evidence against the defendant tending to establish his guilt, those circumstances can be and are as reasonably explained on other hypotheses than that of the defendant's guilt, or as perfectly consistent with defendant's innocence and for that reason a new trial should have been granted."

In this case the evidence tended to show that the defendant was in a building in which was a safe containing the money lost by one Frame, included in which was an English sovereign and a

$100.00 bill. Shortly thereafter the defendant was apprehended, and hidden in his clothing was a $100.00 bill and an English sovereign, and other money. The owner was unable to completely identify the $100.00 bill or the English sovereign. The Court held that this was insufficient, in the language as above stated.

In the case of State vs. Kube, 20 Wis. 217; 91 Am. Dec. 390, the indictment alleged that the defendant obtained by false pretenses, from an express agent, a package of money containing $60.00 in bank bills. The evidence did not very clearly show what the package contained, or that it contained bank bills. The Court held that the prosecutor was confined to proving that the package contained bank bills, and that for failure to do so the case must be reversed.

From the above cases it will be seen that the courts have held that mere possession of propesty of like character to that which has been alleged to have been stolen, is insufficient to convict, although it may be a suspicious circumstance; and that where circumstantial evidence is relied upon, it must exclude every other reasonable hypotheses consistent with the innocence of the defendant. In the case at bar there was no proof that the goods, which the testimony showed were sold by the defendant, were the same identical goods as

those alleged in the indictment to have been consigned to the United States Rubber Co.; nor was there any proof to exclude the presumption that the defendant could have bought or obtained the goods he sold from some place other than the warehouse of the United States Railroad Administration. For this reason we think the Court should have dismissed the case at the conclusion of the testimony, and directed a verdict to acquit, and that its failure to do so was prejudicial error.

V.

The defendant being authorized by the consignee to receive and take the goods in question from the carrier, could not be guilty of stealing such goods.

Assignments of Error XIV, XXIV, XXV and XXVI.

The manager of the United States Rubber Company, consignee of the good in question, testified that the defendant was the duly authorized agent of the United States Rubber Company to **obtain** from all freight and express depots all packages of freight or express which were consigned to the Company, and was authorized to take and receive from the Railroad Company any and all shipments consigned to the said Company, which it was his

duty to bring to the Company's warehouse. (Trans., page 41.)

A checker for the Railroad Company testified that the goods in question were unloaded at Portland, Oregon, from the car on October 2nd, 1918, by men, under his direction, and placed in the warehouse in a pile. (Transcript, page 42.)

The defendant came to the warehouse practically every day to get shipments for the United States Rubber Company, and was the only person who came down to the freight house for them, and was the man authorized to take and carry away all shipments consigned to said Company and that the employee of the Railroad Company accepted the defendant's receipts for all goods shiped to the United States Rubber Company. (Trans., page 44).

All of the above evidence was undisputed.

The defendant requested the Court to instruct the jury that if they found from the evidence that the goods were removed from the freight house by the defendant, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, that it was the duty of the jury to acquit the defendant. Which instruction the Court refused to give. (Trans., page 61, Assignment XIV). However the Court did instruct the jury in effect that even if the defendant

was the authorized agent of the consignee, he would have no right to take the goods contrary to the rules of the Railroad Company, or by reason of his agency to take the goods without the consent of the Railroad Company, or to carry away the goods surreptitiously with intent to convert them to his own use. Transcript, pages 71-73). (Assignments XXIV, XXV and XXVI.)

The statute under which the defendant was indicted makes punishable the larceny of property in interstate commerce. The goods in question were consigned to the United States Rubber Company at Portland, Oregon, and were placed in the warehouse awaiting delivery to the said Company. The defendant was authorized by the said Company to take and receive all of their freight from the railroad depots. The minute he took the same, the goods ceased to be interstate commerce.

Larceny can not be committed, generally speaking, unless the taking is against the will of the owner; therefore, a taking by consent of the owner or possessor, although the taker had a felonious intent at the time of the taking, is not larceny.

25 Cyc., 38.

People vs. Proctor, 82 Pac., 551 (Cal. App.).

It has also been held that where a servant places goods in a receptacle provided by the master, not

in the course of the master's business but for his own convenience as a hiding place, and not intending to relinquish them to his master but to appropriate them to his own use, possession does not vest in the master and the servant afterwards taking the goods does not commit larceny.

25 Cyc. 28.

Com. vs. Ryan, 155 Mass. 523; 31 Am. St. Rep. 560.

The contention of the plaintiff in error on this point is that inasmuch as he was authorized by his employer to take all goods from the freight depot, consigned to his employer, he could not commit the crime of larceny in taking them, and that if after having taken them he conceived the idea of stealing the same, or even if he conceived the idea at the time of taking them, he would not be guilty of the said crime. There was evidence that it was the rule or general custom of the Railroad Company to require the party taking the freight to sign a receipt for same, and that usually the goods were checked out by an employee of the Railorad Company to the delivery man. We do not think that it can be successfully contended that the mere failure to sign a receipt, which is only evidence of the taking of the goods, or to conform to the rules of the Company, would make the defendant guilty of larceny. He was at all times authorized by the

consignee to take the goods from the Railroad Company. If he, after taking the goods, conceived the idea of defrauding his master of same, the crime would be one of embezzlement and a State and not a Federal offense.

The case of U. S. vs. Safford, 66 Fed. 942, we believe, supports our contention. In that case a youth was charged with embezzling a letter containing an article of value, which had been in the postoffice and had not been delivered to the addressee. The letter had been placed by the mail carrier upon the desk of the consignee's manager and from thence stolen by the defendant.

The Court in dismissing the indictment said:

> "Congress only intended to secure the sanctity of the mail while it was in the custody of the Postal Department enroute from the sender to the person to whom it was directed. Beyond the protection of the mail, while discharging the functions of postal service in respect to it, the Federal Government has no rightful power or legal concern. * * * * It would be reprehensible to assume that Congress made a pretext of this power to establish rules of good conduct and punish violations of them, between a principal and agent, or to promulgate police regulations independent of the postal service and after the postal

functions had been performed. Such matters are of local concern, amenable to State law."

In a similar case, U. S. vs. Driscoll, Federal Cases No. 14994, the Court said:

> "I think delivery means in this, as in the other, clause, delivery made to the person or his authorized agent. When such a delivery has been made, the Government is discharged of further responsibility, and its function ceases to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authorities of the State, whose laws regulate such agencies. If those laws make the act an embezzlement, there will be a remedy; if not, it would not be becoming in Congress to do so if it could—which may be doubted. These letters had been delivered to the persons to whom they were directed, because they had been delivered to a servant duly authorized by them to receive their letters."

It has been held in many other cases that where a letter has been left with any one for the addressee, and the party receiving it steals same, such stealing would not be a violation of the federal law.

U. S. vs. Lee, 90 Fed. 256.

U. S. vs. Huilsman, 94 Fed. 486.

We believe that the above cited cases are in

point, in that the defendant Nudelman being the authorized agent of the consignee to take the goods when he did take same, there would be a delivery to the consignee irrespective of the defendant's intentions with respect to the goods at the time of taking them, and such delivery would take the goods out of interstate commerce, and a theft of them from the consignee would be beyond the purview of the Federal statute.

We trust that we have fairly presented to the Court the several questions at issue. It is respectfully submitted that upon due consideration the judgment of the District Court should be reversed.

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ROSCOE C. NELSON,
Attorneys for Plaintiff in Error.

No. 3434

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY NUDELMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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STATEMENT

The plaintiff in error, hereinafter referred to as the "defendant", has, in his brief, grouped his assignments of error under five heads, and they are considered herein in the same grouping and order, namely:

I.

The defendant could not be guilty of stealing property and at the same time be guilty of receiving such stolen property, knowing it to have been stolen.

II.

The indictment does not state a crime.

III.

There was a fatal variance between the allegations of the indictment and the proof.

IV.

There was no proof sufficient to go to the jury showing that the tubes in the possession of the

defendant were the same tubes as those claimed to have been stolen.

V.

The defendant being authorized by the consignee to receive and take the goods in question from the carrier, could not be guilty of stealing such goods.

I.

Defendant contends that he could not be guilty of stealing property and at the same time be guilty of receiving stolen property.

Defendant has evidently failed to read the indictment carefully. It will be noted that the act under which this indictment is brought (Act of Feb. 13, 1913; 37 Stat. L. 670) makes it an offense "to steal, or unlawfully take, carry away, or conceal, * * * * or buy, or receive, or have in his possession * * * * knowing the same to have been stolen * * * * goods moving as or a part of an interstate shipment."

The indictment, in the first count, charges that the defendant did, on a certain date, "steal, carry away, and conceal" certain goods and

chattels (Trans. p. 5). The following counts charge that on subsequent dates the defendant had in his possession a part of these goods and chattels, knowing them to have been stolen. (Trans. p. 6-10). He is not charged with the commission of two crimes by the same act, nor would one of these offenses necessarily be included in the other. They might be committed by the same or by different persons.

> "The intention of Congress is to punish those who steal and carry away property which constitutes an interstate shipment, or those who receive it, or those who have it in their possession. The very nature of interstate commerce in which goods may pass through any number of districts from one boundary of the United States to the other is such that Congress evidently intended that having in possession such property with guilty knowledge should subject the accused to prosecution in any district where the offense should be shown to have been committed, without regard to the fact that the defendant himself may have been the thief."
>
> United States v. Sullivan, 250 Fed. 632.

Since the charges in the counts are not inconsistent and arose from the same transaction, it was proper to join them in the same indictment (Sec. 1024, Revised Stat.), and the allowance or refusal of a motion to elect rests in the sound discretion of the trial court which should not be disturbed except in a clear case of abuse (Gardes v. United States, 87 Fed. 172).

The instructions of the court were clear on this point and defendant was in no way prejudiced by allowing the jury to consider all counts. (Trans. pp. 65, 66).

II.

It is contended that the indictment does not state a crime in the following particulars:

1. That count one of the indictment does not describe the owner, bailee, or custodian of the goods;

2. That the remaining counts do not allege that the goods when stolen were in interstate commerce or were stolen from a railroad car, etc.

In answer to the first contention it is only necessary to refer to the indictment itself which alleges that the goods were "in the custody and

control of said Oregon-Washington Railroad & Navigation Company" (Trans, p. 6). In urging this point, defendant may have had in mind the fact that the evidence shows that the goods were in the custody and control of the Railroad Administration as the operator of the carrier named. This question, however, is considered in another part of this brief.

Defendant's contention as to counts two to six, inclusive, is, in our opinion, the only meritorious exception in the record. These counts are not as definite as they could have been and should have been through more careful preparation, but the jury found the defendant guilty on all counts and regardless of the defects in counts two to six, inclusive, the verdict is sufficient if there is one good count to sustain it (Powers v. United States, 223 U. S. 303).

III.

Appellant contends that there is a fatal variance in two particulars:

1. That the indictment alleges that the goods were stolen from a certain car standing in a certain freight yard (Trans. p. 5) while the evi-

dence is that the goods were stolen from a freight house in the same freight yard; (Trans. p. 42, 44).

2. That the indictment alleges that the goods were taken from the custody and control of the Oregon-Washington Railroad & Navigation Company (Trans. pp. 5 and 6), while the evidence is that they were taken from the custody and control of the United States Railroad Administration as the operator of said railroad company. (Trans. pp. 50, 51, 52).

In support of his contention appellant cites a number of state decisions. We will not discuss these citations as they have no bearing on this case. Whatever may be the law in the various states, under the federal practice, a variance, to be material must be of substance and not of form.

> "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."
>
> Sec. 1025, Revised Statutes.

And the test seems to be whether or not the variance is of such a nature as to mislead the defendant in preparing his defense, and to leave the way open for another prosecution for the same crime.

> "Upon the question of variances between indictments and proofs the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his prejudice."
>
> Harison vs. United States, 220 Fed. 662.
>
> "The essential things involved are that the record should be in such shape as to protect the respondent against a second prosecution for the same offense and as fairly to inform the respondent of the crime intended to be alleged."
>
> Bennett vs. United States, 194 Fed. 630; 227 U. S. 333.

"The tendency of most of the courts at this day, and especially the Supreme Court of the United States, is to disregard technicalities, which can in no way be prejudicial."

Morris vs. United States, 229 Fed. 520.

It is difficult to understand how defendant could have been misled by charging him with taking the goods from one place in a certain freight yard when as a matter of fact he took them from another place in the same freight yard, but a few feet away. The indictment charges defendant with theft of the goods while in interstate commerce and the particular place of the theft is immaterial so long as it was within the court's jurisdiction and is alleged with sufficient certainty to correctly inform the defendant of the particular charge against him. In indictments for larceny, allegations of place like allegations of time, need not be proved as alleged unless material to the jurisdiction of the court or an element of the offense itself.

25 Cyc. 84.

The name of the carrier having custody of the goods was alleged in the indictment as the "Ore-

gon-Washington Railroad & Navigation Company," this same carrier while being operated under federal control and at the time of the theft, was known as the "Oregon-Washington Railroad & Navigation Lines" (Trans. p. 52). The only change in name being the substitution of the word "lines" for "company."

This variance could in no way mislead the defendant, nor is it fatal to the validity of the indictment.

> "It is not essential to the validity of an indictment * * * * that ownership in either the place or the articles be distinctly alleged."
>
> Kasle vs. United States, 233 F. 878.

In the case cited above the goods were alleged to have been taken from a certain station house without a distinct allegation as to the ownership of either the goods or the station.

The court in commenting upon this omission said:

> "While such objections as we have been considering might be avoided, and ought to be, through careful preparation of indictment, still it is plain enough that the act of Congress

here involved was not intended to require strict observance of either all the rules of the common law upon the subject of certainty in criminal pleading, or those growing out of distinct statutes which were intended to change and modify many of such rules. It is to be observed, too, that the relevancy or not of decisions, which in large measure are controlled by local statutes, is to be tested by comparison of those statutes with the particular statute in issue. The act now in question is designed to protect articles which are in course of interstate shipment. When the articles of freight now in dispute are considered in connection with their points of origin and destination and the "railroad station house," as such points and station are described in the counts, it is clear that for purposes of the indictment the freight articles are to be treated as having been 'in course of shipment in interstate commerce' at the times they were alleged to have been stolen; and it is equally clear that when defendant was required to meet the allegations charging him with having possession of the articles his opportunities for identifying them

were quite as available as they would have been if title to the articles, and also to the station, had been laid in the name of the owner of the station. The station was the natural place for the custody and control of such articles until the movement toward their fixed destinations should actually be resumed; and the charge made in the indictment that the goods were 'stolen, taken and carried away' from this station, may be said to have followed the language of the statute."

Kasle vs. United States, 233 Fed. 884.

In the case of Putnam vs. United States, 162 U. S. 687, the indictment charged the defendant with defrauding the "National Granite State Bank," "Carrying on a national banking business at the City of Exeter." The evidence showed that the defendant had defrauded the "National Granite State Bank of Exeter." The variance was held immaterial.

"It is impossible, therefore, to suppose that the omission of the words "of Exeter" could have in any way misled the defendant, or failed to convey to his mind what bank was intended to be referred

to. It is manifest, therefore, that the omission could not have operated in his prejudice."

It is immaterial who actually owned and operated the carrier having possession of the goods. The essential thing is that the goods, at the time of the theft were still in the custody of the carrier as a part of an interstate shipment, and the name of the carrier is sufficiently alleged for identification.

> " 'If the sense be clear, nice exceptions ought not to be regarded' and 'unseemly niceties should not be indulged', nor 'an overeasy ear be given to exceptions whereby more offenders escape than by their own innocence, to the shame of the government, to the encouragement of villany, and to the dishonor of God.' "

United States vs. Howard, 132 Fed. 333.

IV.

Defendant contends that the evidence was not sufficient to go to the jury as the tubes in the possession of the jury were not identified as the tubes that were stolen.

Briefly stated, the evidence is that the defendant was the authorized agent of the consignee to

receive the goods from the carrier (Trans. p. 41), and was the only person who ever called for the consignee's shipments (Trans. p. 44); that he knew that this particular shipment had been lost (Trans. p. 43); that he had discussed the loss (Trans. p. 45); that he had in his possession at a later date a box containing the exact number, sizes, and make of tubes contained in the lost shipment (Trans. p. 45, 46); that he sold these tubes at a price below the market value (Trans. p. 45, 46); and endeavored to induce one Cohen to make a false statement regarding the manner in which the tubes came in his possession (Trans. p. 45, 46).

There is no rule of law, so far as we know, that requires the proof of a fact beyond every possible and fanciful doubt. Neither courts nor juries are required to cast about for possible explanations which the defendant fails to offer. It is true that the identification is by circumstantial evidence, but "all evidence is more or less circumstantial, the difference being only in degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual and not technical, disbelief, for he who is to pass on the question is not at liberty to dis-

believe as a juror, while he believes as a man." (Jones Commentaries on Evidence, Sec. 6d).

> "The only alleged error * * * is the refusal of the court below to direct a verdict of acquittal * * * * upon the ground that the evidence was not sufficient to justify a finding that he had knowledge, when the goods came into his possession, that they had been stolen. There was, it is true, no direct evidence that he had such knowledge. But after a careful examination of the record, and bearing in mind the rule that to justify a conviction of crime on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt, we think that the inference could be legitimately drawn, from all the facts and circumstances which the testimony discloses, that he did have the requisite knowledge.
>
> * * * *
>
> "When one, charged with having stolen goods in his possession, makes a statement to the public authorities as to how he came to have them, and later, under oath, makes an entirely different statement, it seems quite

impossible, in the light of other circumstances above detailed, to escape the conclusion that reasonable men would be justified in drawing the inference therefrom that he knew or believed that the goods had been stolen. If he had come by them honestly or had no knowledge or reason to believe that they had been stolen, it is inconsistent with ordinary human conduct that he should have made two such utterly variant and irreconcilable explanations. In view of the contradictory statements, and the other circumstances of the case, the only hypothesis of innocence is that he had obtained possession of them in either one of the two ways he had stated. It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and if neither were, they were certainly justified, in the light of other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them."

Chass v. United States, 258 Fed. 910.

The defendant was present at the trial and, while he was not required to make any explanation,

he had the right and the opportunity to do so. Without some explanation, the evidence would exclude every reasonable conclusion but that the goods in the defendant's possession were the same goods that had been stolen, and that is all that is required.

V.

Defendant contends that, as he was the authorized agent of the consignee to receive the goods from the carrier, he could not be guilty of stealing them.

Defendant was the agent of the consignee and not of the carrier and his authority over the shipment extended only from the time the carrier made delivery to the consignee (Trans. pp. 41, 42, 43, 44, 49). It will be noted that the citations of defendant in support of his contention refer to cases where delivery had been made and the carrier relinquished control. Delivery in this case had not been made, in fact, the defendant himself made demand on the carrier for delivery after the shipment had disappeared (Trans. pp. 42, 43).

It is suggested that he is guilty of embezzlement and not larceny, but he could not be guilty

of embezzlement from the carrier as he was not the agent or employee of the carrier and all the evidence is to the effect that the goods were taken while under the carrier's control (Trans. pp. 42, 43, 44, 45).

We believe that no error was committed by the trial court, that the defendant was correctly informed of the charge he was called upon to meet, that the case was fairly presented to the jury, and that the verdict is in accord with the law and the evidence. For these reasons we believe that the judgment of the trial court should be sustained.

Respectfully submitted,

LESTER W. HUMPHREYS,
United States Attorney for Oregon.

JOHN C. VEATCH,
Assistant United States Attorney for Oregon.

No. 3334.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Thomas H. Gordnier,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

PETITION FOR REHEARING

ROBERT O'CONNOR,
United States Attorney.
ROBERT O'CONNOR,
United States Attorney, for Petitioner.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Thomas H. Gordnier,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

The opinion of this court in the above case, filed January 5th, 1920, reversed the judgment of the lower court wherein the defendant was convicted for failure to register under the Selective Service Act and remanded the cause for retrial. The defendant in error respectfully petitions that a rehearing be granted.

In this behalf it is respectfully suggested that the importance attached to the decision of this court in this case is because of new ground being broken in Federal jurisprudence, so that it is not a matter of this case alone, but a matter of perhaps hundreds of other cases which may involve some one of the new points that are now being passed upon.

The basis of the court's opinion is that there was no proof of the *corpus delicti* other than certain declarations of the defendant made long prior to the alleged commission of the offense, which declarations therefore are admittedly neither admissions nor confessions. It should be remembered that the *corpus delicti* in the case of failure to register consists of the failure to register and the age of the defendant, which means that in this kind of a case the *corpus delicti* and the guilt of the defendant are inseparable. The failure to register was proven by testimony that the defendant on the registration day lived in a certain precinct and by proper evidence by the local board of that precinct that the defendant was not registered.

This Honorable Court, in its opinion, held that there was no evidence tending to prove that part of the *corpus delicti* relating to age except the *ante litem motam* declarations of the defendant, and that those declarations alone could not prove age.

In so holding, the court breaks new ground in two material respects, first, in holding that *corpus delicti* could not be proven by *ante litem motam* declarations; and, second, by extending to misdemeanors the general rule that in felonies and other high crimes the *corpus delicti* cannot be proven by admissions or confessions standing alone.

Somewhat exhaustive research of the authorities fails to disclose any case in which the exact question of whether the *corpus delicti* may be proven by *ante litem motam* declarations has been considered by a court of record. We did find, however, that the gen-

eral rule as it applies to felonies and high crimes was established in this country to modify and lighten the severity of the rule as enforced in the English courts in the last of the eighteenth and the beginning of the nineteenth century, which was that a conviction might be had upon a confession alone. We further find that the grounds upon which the rule rests are the hasty and unguarded character which confessions often have, the temptation which for one reason or another a party may have to say that which he thinks it most for his interest to say, whether true or false, and the liability which there is to miscontrue or report inaccurately what has been said. But certainly none of those reasons attach to the declarations that we find involved in this case, made at a time long prior to the date of the alleged commission of the offense, in writing and sworn to by the defendant.

The defendant in this case is admittedly either 45 or 46 years old. It may well be presumed that all those having actual knowledge of the date of his birth have passed away. There would seem to be no better proof of his correct age than those declarations of the person himself made from time to time, particularly where those declarations are in writing and have been sworn to by the person himself. Where, as in this case, those sworn written declarations all agree as to the age of the person, and where, as in this case, the person himself when confronted with those declarations in court stands silently by and furnishes no proof of any kind that his age is other than as is declared in those former sworn declarations, although if any one

had it in his power to prove the correct age, it would be he himself, then it seems that there is little reason left for the enforcement of such a rule under such circumstances.

The difference between *ante litem motam* declarations and those made after the controversy has arisen is referred to in the case of Gorham v. Settegast, 98 Southwestern Reporter, page 655, quoting from page 667:

> "That questions of pedigree, such as marriages, births, and deaths of members of a family, may be proved by declarations of the members of the family, which go to make family tradition and history, is an old exception to the rule which, ordinarily, excludes hearsay evidence. This rule rests upon the principle that natural effusions of those who talk over family affairs, when no special reason for bias or passion exists, are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life. To be admissible as evidence, such declarations, however, must have been made *ante litem motam;* for, if made during the course of a controversy, they are regarded as lacking in the ground of trustworthiness."

Rule Stated by This Court as Basis for Its Opinion Not Applicable to Misdemeanors.

Secondly, it should be remembered that the offense of which the defendant was convicted is a misdemeanor. The general rule as to the admissibility of admissions and confessions without other proof of the *corpus delicti* is enforced only in cases of felonies and other

high crimes, so that to extend to admissions and confessions even, would be establishing a new rule, and much more so is the extending of the rule to apply to *ante motam* declarations in cases of misdemeanor.

It will be seen from the study of Federal cases particularly, such as Flower v. U. S., 116 Fed. 241; and Daeche v. U. S., 250 Fed. 566, that the tendency of the courts is to relax the rule, and, indeed, the wording of these two opinions is such as to indicate that if the offenses of which the defendants in those cases had been convicted were misdemeanors, the rule would not have been invoked. In the Daeche case before Circuit Judges Ward and Hough, and District Judge Learned Hand, the court says:

> "That the rule has in fact any substantial necessity in justice, we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, #2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though we should have the support of the Supreme Court of Massachusetts in an opposite opinion. Com. v. Killion, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911."

Diligent search has failed to disclose any case in the Federal courts where the rule has been applied to misdemeanors, and with the tendency of the courts against the enforcement of the rule in felonies and high crimes, it would not seem expedient at this late date for the first time to apply it to misdemeanors.

I quote from Commonwealth v. Quick, 15 Pa. District Courts 260, quoting from page 261:

> "The other position taken by counsel for the defendant has considerable more merit in it, and is entitled to much consideration, viz., that a conviction could not be had upon a confession alone; that it should be corroborated by other evidence establishing a *corpus delicti.* An examination of the authorities upon this subject shows that, under the criminal practice of the courts of England, a confession is conclusive without proof *aliunde* of the *corpus delicti:* 3 Russells on Crimes (6th Ed.), 477; Rex v. Tippet, Russ. and R. Y. 509; Rex v. White, Russ. and R. 508; Rex v. Eldridge, Russ. and R. 440. But the practice in the courts of the several states of the United States is to the effect that a confession should be corroborated *aliunde.*
>
> "We have given this matter considerable investigation, and while we find the latter rule to be the one as practiced by the courts of the several states, yet the cases cited related to serious crimes, and we think it not a forced assumption to say that the reason of the rule was dependent to a large extent upon the serious nature of the crime, accompanied by the further reason for the holding of the rule, and that is, the effort of the several courts to modify and lighten the severity as practiced in the English courts in the last of the eighteenth and the beginning of the nineteenth century relative to the trial and punishment of alleged crime. The reason for the rule no longer existing, the rule itself should cease, and we are of the opinion that there is no reason for any such rule in the practice of the courts in the trial of

misdemeanors and violations of law, which may be classed as police regulations, and especially so when there is added to this that a confession is the very best evidence that can be obtained under all the circumstances.

"Here is a case in which the minor was a delinquent. If called upon to testify in court she would have been confronted with the fact that her own testimony would convict her of an infraction of the order of the court relative to her conduct, and she could easily have refused to testify. There is nothing in the evidence that any persuasive influences were used upon the defendant, nor that his confession was in any sense other than voluntary. He at once admitted the truth of the charge, and gave in detail the acts constituting the offense as charged. Without any other evidence whatsoever we are of opinion that this was sufficient to sustain a conviction of a violation of the law. The only case which we have been able to find which sustains this position is that of State v. Gilbert, 36 Vermont 145, viz.:

" 'The rule laid down in some books that there can be no conviction of crime upon confessions alone without other proof of the *corpus delicti* is held not applicable to the lower grade of crimes, as to the offense of selling liquor in violation of the statute.'

"The commonwealth established by the evidence the existence of Ada Ike, that she was a minor child between the ages of fourteen and fifteen years, the arrest of the defendant, his appearance before the magistrate, and his admission of the truth of the charges as made. and a statement upon his part of how the alleged misdemeanor was committed. To sustain a conviction under this

evidence would establish no precedent that could in any way affect the rule as laid down relative to confessions in trials for crimes of serious nature, and it is our opinion that such confession should be sufficient to sustain the conviction without other proof of the *corpus delicti,* and we so hold."

Also from Supreme Court of Vermont, in State v. Gilbert, 36 Vermont Reports, page 148:

"It is claimed on the part of the respondent that confessions alone are not sufficient in law to warrant a conviction. It is true that it is said in some of the books that the accused should not be convicted upon confessions without some other evidence tending to show that the crime has been committed, or as it is said, unless there is other proof of the *corpus delicti;* that is, in case of murder, that the person alleged to have been murdered is deceased, or in case of larceny, that the property alleged to have been stolen has been taken or lost. This however is said usually in reference to high crimes. Whether this is an absolute rule of law, or a precautionary rule merely to be observed by jurors or the triers of fact in weighing the evidence, it is unnecessary to decide. If it is a rule of law applicable to felonies and the higher crimes, we think there is no such absolute rule of law applicable to the lower grades of crime or misdemeanors to which this offense belongs; although great caution should always be exercised in weighing evidence when it consists of confessions alone. This objection to the character or sufficiency of the evidence cannot prevail. Thus far we find no error."

There Was Sufficient Evidence Aliunde to Justify Admission Ante Litem Motam Declarations of Defendant.

Without regard to the foregoing conclusions, it is respectfully suggested that perhaps the court in arriving at its conclusion that there was no proof of age other than the declarations of the defendant, has overlooked the fact that there was some evidence of the *corpus delicti* in so far as age is concerned other than the declarations of the defendant. It is conceded that slight evidence of the *corpus delicti* would make admissible the declarations of the defendant and that then if the slight evidence together with the declarations of the defendant, convinced the jury beyond a reasonable doubt, conviction is proper, and the verdict of the jury will not be disturbed on appeal.

The evidence of age other than the affidavits of the defendant was the presence of the defendant before the jury, and the unquestioned right of the jury to observe the defendant, and consider the results of that observation in arriving at his age.

As stated by Jones on Evidence, section 401, page 506:

> "But the jury may, when age is an issue, take into consideration the appearance of the defendant as seen in court."

Citing:

Jones v. Jones, 106 Ga. 365;
Com. v. Holles, 170 Mass. 433;
State v. Thompson, 55 S. W. 1013;
Hermann v. State, 73 Wis. 248.

> "There is, however, authority for the proposition that the jury may, without any other evidence than mere inspection, determine whether a person to whom liquor has been sold is a minor, or whether a person is of sufficient age to perform the work given him to do."
>
> Com. v. Emmons, 98 Mass. 6.

In the case of Commonwealth v. Emmons, 98 Massachusetts 6, the defendant was charged with keeping a billiard room and admitting thereto minors without the consent of their parents. Upon the trial, one of the alleged minors was called as a witness, but the defendant objected to his testifying to his own age, and the court permitted the jury to determine by personal inspection whether or not the witness was a minor. *No other evidence of age was offered.* In this case age was as much a part of the *corpus delicti* as in the instant case, and yet the Supreme Court of Massachusetts says:

> "There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under age from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing upon the question of his age, and it does not appear that this may not have afforded plenary evidence of the fact, the defendant fails to show that he was convicted on insufficient evidence or that he has been prejudiced by the ruling of the court."

So in Commonwealth v. Hollis, 170 Mass., page 433, where the defendant was charged with having carnal knowledge of a female under the age of 16 years. Through inadvertence, or for some reason, the girl was not asked her age, and there was no proof of age, yet the Supreme Court sustained the conviction because it was not incompetent for the jury to consider her appearance in determining her age. It may have been quite obvious that she was under sixteen."

The rule is well stated in the Modern Law Evidence, Chamberlain, Vol. 3, section 2045 and 2048:

> "Where a person whose age is in question is present in court or an inanimate object is submitted to the inspection of the jury, the latter will be permitted to draw the necessary inference for themselves, unassisted by witnesses, ordinary or skilled."

Nor does the fact that the defendant in this case failed to take the stand differentiate from the cases in support of the above rule, nor could it be said to contravene the fifth amendment by compelling the defendant to become a witness against himself.

See Holt v. U. S., 218 U. S. 245, where on page 252, the Supreme Court says: :

> "Another objection is based upon an extravagant extension of the fifth amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be ex-

> cluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams v. New York, 192 U. S. 585."

Therefore, when considered in the light of the cases of Flower v. United States, 116 Fed. 241; Dadche v. U. S., 250 Fed. 566; U. S. v. Williams, 28 Fed. Cases, 16,707; Naftzger v. U. S., 200 Fed., p. 494; Commonwealth v. Killion, 194 Mass. 153; People v. Badgley, 16 Wend. (N. Y.) 53; and People v. Jones, 123 Cal. 65; it will be seen that the rule generally followed is that the evidence *aliunde* of the *corpus delicti* may be very slight to make admissible declarations—or even confessions—and to justify a verdict if the jury believes the *corpus delicti* has been proven beyond a reasonable doubt by the slight evidence *aliunde* plus the declarations of the defendant.

The Circuit Court of the Second Circuit in the Dadche case above, page 571, speaking of the circumstances *aliunde*, which are required to be proven before the admissibility of the defendant's confessions, says:

"Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of truth."

And the Circuit Court of Appeals for the Fifth Circuit in Flower v. U. S., 116 Fed., reading from page 247, says: :

"The rule so strenuously urged on behalf of the plaintiff in error had its origin at a time when many offenses were punished capitally, and was first applied in cases where the offense charged was murder or other capitally punished felonious homicide, and was so established as a necessary caution against inflicting the last extreme of punishment upon one accused of a crime which had never been committed; and it took its first form in the expression that 'the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body,' on which Mr. Starkie remarks that it is a rule warranted by melancholy experience of the conviction and execution of supposed offenders with the murder of persons who survived their alleged murders. Mr. Bishop says:

" 'This doctrine, requiring a special directness and clearness of the evidence to the fact of there having been a crime, was extended to larcenies from unknown persons, and to some and possibly all other indictable delinquencies. But the doctrine, at least in later times, has been regarded rather of caution than of absolute law.' Bish. Cr. Proc. #1056.

"Judge Samuel Nelson, then chief justice of the Supreme Court of Judicature of New York, in delivering the opinion of the court in the case

> of People v. Badgley (October term, 1836) announced the doctrine on this subject to be 'that full proof of the body of the crime,—the *corpus delicti*,—independently of the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient.' The offense involved in that case was that of forgery. 16 Wend. 53. More than 20 years later this doctrine was largely discussed by Mr. Justice Clifford in U. S. v. Williams, in which the defendants were charged by indictment with murder on the high seas, and the conclusion reached that 'all that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced it belongs to the jury, under the instructions of the court, to determine upon its sufficiency.' 1 Cliff. pp. 5-28, Fed. Cas. No. 16,707."

So far as the transcript in this case indicates, the defendant in appearance may have been nearer 35 than 45, in which event certainly the jury would be justified in assuming that the defendant was right in his several sworn, written declarations, which would make him 45, as claimed by the government, instead of some age beyond that, as doubtless claimed by the defendant, although the defendant did not take the witness stand nor produce any evidence whatever, so that we know not what his intentions in that regard really are.

Remembering that the offence is a misdemeanor, it would seem that the foregoing authorities would make

such inspection by the jury some evidence of *corpus delicti,* in so far as age is concerned, which would make admissible at least *ante litem motam* declarations.

It will be noted that the matters referred to in this petition were not called to the attention of this court either in the briefs or upon oral argument, and it is impossible and perhaps not expected to fully cover them in this application, but it is respectfully suggested that they are of sufficient importance to justify the granting of a rehearing, so that they might be fairly presented to this Honorable Court by both sides, to the end that when the decision is finally rendered and reported, it will not be open to subsequent attack when used in later cases that these points were not presented to the court and decided by it.

ROBERT O'CONNOR,
United States Attorney.

I, Robert O'Connor, United States Attorney for the Southern District of California, and one of the attorneys for the petitioner, the United States of America, in the foregoing petition for rehearing, do hereby certify that in my judgment this petition is well founded and that it is not interposed for delay.

ROBERT O'CONNOR,
United States Attorney, for Petitioner.

No. 3436

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY, and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3436

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY, and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals for the Ninth Circuit.

F. M. HATHAWAY et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

Names and Addresses of the Attorneys of Record.

ISHAM N. SMITH, 611–13 American Bank Building, Seattle, Washington, and CHARLES A. HARDY, Eugene, Oregon, for Appellants.

PLATT & PLATT and HUGH MONTGOMERY, Platt Building, Portland, Oregon, for Appellee.

In the District Court of the United States, for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY, a Corporation,

Plaintiff,

vs.

F. M. HATHAWAY, and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL, and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY.

Defendants.

Citation on Appeal.

United States of America, to the Ford Motor Company, a Corporation:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, thirty (30) days after the date of this citation, pursuant to an order allowing such appeal, filed and entered in the clerk's office of the District Court of the United States for the District of Oregon, from a final decree signed, filed and entered on July 28th, 1919, in that certain suit being in equity, No. 2932, wherein you, the said Ford Motor Company, are plaintiff and Appellee, and wherein the defendants are appellants, to show cause, if any there be, why the decree and also the order overruling the motion for rehearing and reargument, also objection to said decree, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in the premises.

WITNESS, The Honorable ROBERT S. BEAN, United States District Judge for the District of Oregon, this 4th day of December, 1919.

CHARLES E. WOLVERTON,

United States District Judge for the District of Oregon. [1*]

Due service of the within citation admitted in Dec., 1919.

HUGH MONTGOMERY, PLATT & PLATT,

Solicitors for Plaintiff.

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*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. 2932. District Court of the United States, for the District of Oregon, Northern Division. Ford Motor Company, a Corporation, Plaintiff, vs. F. M. Hathaway et al., Defendants. Citation on Appeal. U. S. District Court, District of Oregon. Filed Dec. 4, 1919. G. H. Marsh, Clerk. [2]

In the District Court of the United States, for the District of Oregon.

November Term, 1917.

Be It Remembered, That on the 25th day of February, 1918, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States, for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Bill of Complaint.

Plaintiff for its cause of action against the defendants complains and alleges as follows:

I.

That during all the times hereinafter mentioned the plaintiff was, and still is, a corporation incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and place of business at Highland Park, Michigan, and has conformed to the laws of the State of Oregon authorizing foreign corporations to do business within the State of Oregon, and is a citizen and resident of the State of Michigan.

II.

That during all the times hereinafter mentioned, the defendants V. W. Winchell and F. M. Hathaway were copartners, doing business under the firm name and style of "Eugene Ford Auto Company" in the city of Eugene, State of Oregon, and were, and still are, citizens of the State [4] of Oregon.

III.

That on or about the 10th day of September, 1915, the plaintiff and defendants entered into a contract known as a "Limited Agency Contract" wherein and whereby the plaintiff appointed the defendants as its limited agents within certain territory in the State of Oregon, for the purpose of negotiating sales of Ford automobiles to users only, which said contract further provided that the same should remain in force and govern all transactions between the parties until July 31st, 1916, upon the condition, however, that either party might be at liberty to terminate and cancel the contract upon written notice by registered mail, at any time, with or without cause, a copy of which is hereto attached, marked Exhibit "A."

IV.

That on or about the 25th day of May, 1916, the plaintiff, acting under and in accordance with the provisions of said contract of agency, terminated said agency contract by letter, duly registered and forwarded to the defendants through the mails of the United States, and was ready, able and willing to perform all the conditions of said cancellation as in said Exhibit "A" required.

V.

That at the time of the cancellation of said contract, said defendants had in their possession thirty-six touring cars, and one sedan, which had been consigned by the plaintiff to said defendants under and in accordance with the provisions and upon the conditions set forth in said agency contract.

VI.

That prior to the cancellation of said contract, and on or about the 22d day of April, 1916, the 1st day of [5] May, 1916, and the 24th day of May, 1916, respectively, the said defendants, procured from the First National Bank of Eugene, Oregon, the sum of $14,000.00, evidenced by three promissory notes, bearing dates the 22d day of April, 1916, the 1st day of May, 1916, and the 24th day of May, 1916, respectively, the first note being for the sum of $2,800.00, the second note being for the sum of $2,800.00, and the third note being for the sum of $8,400.00, each of which notes was secured by a chattel mortgage upon the said thirty-six cars and one sedan, referred to in Paragraph V of this complaint, which said sums of money were in form so procured from the First Na-

tional Bank of Eugene, Oregon, by the defendants individually, although in truth and in fact the said defendants, in obtaining said sums of money, and in executing and delivering said notes and said chattel mortgage to secure the payment of the same, were acting as the agents of the plaintiff under and in accordance with the provisions of said contract referred to in Paragraph III of this bill of complaint, and said defendants, after procuring said sums of money as the agents of the plaintiff, converted the same to their own use and benefit.

VII.

That subsequently, and on or about the —— day of —— the plaintiff paid to the said First National Bank of Eugene, Oregon, the sum of $12,676.38, being the amount due upon said three promissory notes, and procured from said bank a release of the lien created by the defendants, its agents, upon said automobiles in the manner hereinbefore set forth in Paragraph VI of the complaint, and said plaintiff made such payments to said First National Bank of Eugene, Oregon, of the said sum of [6] $12,676.38, because the said defendants had refused to make such payment and thereby release said automobiles from the lien so created thereon by the said defendants, and said defendants, as the agents of the plaintiff, have received and still have in their possession the sum of $12,676.38, so received from the said First National Bank of Eugene, Oregon, and have refused, and still refuse, to pay said sum of money, or any part thereof, to the plaintiff herein, although demand has been made therefor, and although the plaintiff has paid said

sum to the said First National Bank of Eugene, Oregon, and has secured from said bank a release of the lien imposed upon the said automobiles, which were owned by the plaintiff at the time when said chattel lien was imposed thereon by the defendants as the agents of the plaintiff, and the said defendants have received the sum of $12,676.38, or the double payment of said amount on said notes, and have received the possession of the sum of $12,676.38, which in equity and good conscience belongs to the plaintiff, and the amount of money so paid by the plaintiff to the First National Bank of Eugene, Oregon, as in Paragraph VI of this bill of complaint set forth, constituted a portion of the amount of money to which the defendants were entitled under and by virtue of the terms of the agreement referred to in Paragraph III of this bill of complaint by way of tender upon the concellation of said contract by the plaintiff, as in Paragraph IV of this bill of complaint alleged, and the plaintiff has made an offer in writing to pay to the defendants the particular sums of money to which the defendants are entitled by reason of the cancellation by the plaintiff of the contract set forth in Paragraph III of this bill of complaint, which offer the defendants have at all times refused to accept, and which [7] offer the plaintiff has at all times since been, and still is, ready, willing and able to carry out, in the manner alleged in Paragraph VI of this bill of complaint.

VIII.

That said defendants, and each of them, are at the present time insolvent and have no means whereby to

satisfy the payment of said sum of money, or any portion thereof, so due and owing from the defendants to the plaintiff.

IX.

That on or about the 11th day of September, 1916, the defendants obtained a judgment in the District Court of the United States for the District of Oregon, against the plaintiff, in the sum of $22,146.05, and said defendants are about to obtain execution upon said judgment, and levy the same upon the property of the plaintiff, and if said defendants are allowed to proceed with said levy, the plaintiff will be deprived of any method of obtaining the payment from the said defendants of the said $12,676.38, to plaintiff's great and irreparable damage, and the plaintiff has at all times since, and still is, ready, willing and able to pay to the defendants the amount of said judgment, less the said sum of $12,676.38.

X.

That this is a controversy between citizens of different States and involves more than $3,000.00 exclusive of interest and costs.

XI.

That plaintiff has no plain, speedy or adequate remedy at law, but only in equity.

WHEREFORE, plaintiff prays: [8]

1. For a decree and judgment in favor of the plaintiff and against the defendants in the sum of $12,676.38.

2. That the said sum of $12,676.38 be offset against the judgment held by the defendants against the plaintiff in the sum of $22,146.05.

3. For a temporary restraining order restraining defendants from levying execution upon the property of the plaintiff on that certain judgment made and entered by the United States District Court, for the District of Oregon, on the 11th day of September, 1916, in favor of the defendants and against the plaintiff, and for an order setting a day certain for said defendants to appear and show cause why said temporary restraining order should not be made permanent.

4. That this Honorable Court may grant unto the plaintiff a writ of subpoena of the United States, directed to the defendants V. W. Winchell and F. M. Hathaway, therein and thereby commanding said defendants, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer all and singular the matters and things aforesaid, and to stand and abide by, and sustain such direction and decree as shall be made herein as to this Court may seem equitable and just.

5. For such other and further relief as to the Court may seem equitable and proper.

PLATT & PLATT,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel. [9]

Plaintiff's Exhibit "A."

1915—Limited Agency Contract—1916

THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and

between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party, and Eugene Ford Auto Co., of Eugene, in the State of Oregon, hereinafter known as the second party, WITNESSETH:

WHEREAS, the first party is the manufacturer of a line of Automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS, the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT.

(1) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiation sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT.

(3) That first party will consign *ts* Ford automobiles to second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY.

(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely: [10]

* * * * * * * * *

The entire territory, including that of the Sub-limited Agents, shall consist of the following, namely:

(4) All of Lane County except extreme western portion of townships in R–10–W, R–11–W and R–12–W; portion of Douglas County Tier, T–9–S in R–6–W to R–9–W; Tier T–20–S R–4–W to R–9–W; Tier T–21–S, R–4–W to R–9–W inclusive. Portion Lane County as follows: T–15–S R–9–W, T–16–S R–8–W, T–16–S R–9–W, Tier of (288 cars) T–15–S R–1–W and R–1–E to R–8–E; Tier T–16–S, R–1–W to R–3–W inclusive. Tier T–16–S R–1–E to R–8–E inclusive. Tier T–17–S R–1–W to R–9–W inclusive. Tier T–16–S R–1–E to R–8–E inclusive. Tier T–17–S R–1–W to R–9–W inclusive. Tier T–17–S R–1–E to R–8–E inclusive. Tier T–18–S R–5–W to R–9–W inclusive. Tier (170 cars) T–17–S R–1–E to R–8–E inclusive. Tier 18–S R–5–W to R–9–W inclusive. Tier T 18–S R–1–E to R–7–E inclusive. Tier T–19–S–R–1–E to R–7–E inclusive. T–19–S R–7–W north half of T–18–S R–1– and 2 W. Portion of Northern part of Douglas County, being townships lying north of Tier T–22–S within ranges 4–W to 9–W, southern part of Lane County lying south of Tier T–19–S; also Tier T–19–S in R–1–W to R–6–W inclusive. The southern half of T–18–S

R–1–W, and T–18–S in R–2–W, Tier T–15–S and Tier T–16–S in R–4–W to R–7–W inclusive, also the town of Springfield, (118 cars).

The retail territory, that is, the territory wherein second party arranges direct sales (and in which no Sublimited Agents are appointed) consists of the following, namely ———————————————

———————————————

———————————————

The remainder of said entire territory shall be known as wholesale territory wherein shall be appointed Sublimited Agents as herein provided, namely ———————————————

———————————————

———————————————

RESIDENCE DEFINED.

In this connection it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this subdivision shall be final and conclusive, with no recourse or appeal on the part of the second party.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sublimited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital

consequence to the first party and its business, as well as to the business of all other Limited Agents and Sublimited Agents and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of two hundred fifty dollars ($250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe for business done, to second party. First party may also cancel this contract for any such violation. [11]

PRICES.

(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus fifty-three and 25/100 dollars ($53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List Price" are used herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY.

(7) Second party shall arrange all sales of Ford automobiles for cash only; but if second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to first party.

REBATES FORBIDDEN.

(8) Second party will not render any service or

supply any goods either gratis or at reduced prices, nor do or permit any act whatsoever either directly or indirectly or through other parties that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, second party shall pay to the first party the sum of two hundred fifty dollars ($250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to second party on which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

CHANGES IN PRICES.

(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof and in case of increase or deduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commissions on automobiles yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such

automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES.

(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party. [12]

FREIGHT.

(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

TITLE OF AUTOS.

(12) First party shall retain all and complete title to each automobile until actual bill of sale signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES—INSURANCE.

(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same, and for freight paid by

him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS.

(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and second party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS.

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the first party who shall be the custodian thereof and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS.

(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required of a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS.

(17) The second party shall report each week to

first party all Ford automobiles contracted for by him with purchasers under this agreement, including all sales by Sublimited Agents and their purchasers, giving motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser. [13]

WARRANTY.

(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by the first party.

REPRESENTATIONS.

(19) The second party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If second party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS.

(20) In case of damage to automobiles by carriers in transit to second party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the second party shall be entitled to eighty-five per cent (85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to second

party all its claims in such matter, whereupon second party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the second party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS.

21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS.

(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for damage of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency he expressly agrees that he will bear all damages or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while

in his possession, or while in transit from first party to second party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sublimited Agents, therefore and in consideration of this contract [14] the second party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to second party his advances on same. The second party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of second party's said business or Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES.

(23) The second party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his possession or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS, ADVERTISEMENTS.

(24) The second party agrees to conspicuously display signs on and in his building and windows designating that he is the "Limited Agent for Ford cars" for the territory specified herein, and he shall advertise the first party's product effectively in the

local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sublimited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Second party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in a workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number or other numbers or marks fixed to any Ford automobile, or suffer the same to be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR.

(26) Second party agrees to purchase from first party for himself and keep in use at all times at least one Ford automobile of the current year's model for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper

running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, second party agrees that he will sell the same at the full advertised list price only, and within his own territory only, as provided in subdivisions four, six and eight hereof. For any breach of this provision the [15] second party shall pay to first party two hundred fifty dollars ($250.00) as reasonable liquidated damages. The only warranty of such demonstrator or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed on the Retail Buyer's Order.

PATENTS.

(27) First party owns, and the Ford automobiles are manufactured under and embody the following letters patent of United States or some of them, namely:

United States Letters Patent No. 747,909, issued December 22, 1903.

United States Letters Patent No. 773,934, issued November 1, 1904.

United States Letters Patent No. 787,908, issued April 25, 1905.

United States Letters Patent No. 847,405, issued March 19, 1907.

United States Letters Patent No. 879,757, issued February 18, 1908.

United States Letters Patent No. 1,005,186, issued October 10, 1911.

United States Letters Patent No. 1,012,620, issued December 26, 1911.

United States Letters Patent No. 1,044,038, issued November 12, 1912.

United States Letters Patent No. 1,066,729, issued July 8, 1913.

United States Letters Patent No. 1,073,569, issued September 16, 1913.

United States Letters Patent No. 1,075,557, issued October 14, 1913.

United States Letters Patent No. 1,078,042, issued November 11, 1913.

United States Letters Patent No. 1,098,361, issued May 26, 1914.

—and of applications for letters patent now pending and undetermined, first party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20, 1909, (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the second party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that second

party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions as set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS.

(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in the cases specified in subdivision nine hereof) fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid. [16]

ADDITIONAL COMMISSIONS.

(29) First party agrees to allow and pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement, upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than $5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission to the amount of $5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than $10,-

000.00, one per cent (1%); if $10,000.00 and less than $20,000.00, two per cent (2%) on all such business; if $20,000.00 and less than $35,000.00, three per cent (3%) on all such business; if $35,000.00 and less than $50,000.00, four per cent (4%) on all such business; if $50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done $7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such $7,000.00. If, for illustration, his total business as above described shall be $34,900.00, his commission shall be three per cent (3%) on all of such $34,900.00. If $49,900.00 then four per cent (4%) upon all of such $49,900.00; if it shall total $50,000.00, then five per cent (5%) on all of such $50,000.00 and likewise five per cent (5%) upon all such business over $50,000.00. If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled, to and shall receive the higher percentage.

PAYMENTS TO SUBLIMITED AGENTS SECURED.

(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sublimited Agents under the second party have been fully paid, or until satisfactory

arrangements are made with the first party to insure Sublimited Agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts.

COMPANY MAY SELL DIRECT.

(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sublimited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sublimited Agents, but only to these made by first party directly to purchaser domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sublimited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory. [17]

STOCK OF FORD PARTS.

(32) Second party agrees that he will purchase from the first party on his own account and carry on hand at second party's place of business aforesaid, a stock of Ford parts that will inventory at all

times during the term of this agency contract not less than Two Thousand Dollars ($2,000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchase of parts for Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS.

(33) First party agrees to allow the second party a discount of twenty-five per cent (25%) on all parts of Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of second party's agreement to carry stock as provided in subdivision thirty-two as above, and in consideration of the other provisions of this contract.

First party agrees to allow second party an additional discount of ten per cent (10%) on all Ford parts sold by second party at wholesale to Sub-Limited Agents under him; said additional ten per cent (10%) to be credited by first party monthly on receipt by it of certified itemized statement of

such sales and deliveries made during the previous month by the second party.

RETURN OF PARTS.

(34) The second party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields and other equipment known in the trade as "accessories," provided same are in as good condition as when sold by the first party to the second party.

COMPANY MAY SELL PARTS.

(35) First party reserves the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories, or other goods that may be ordered from it by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the second party upon such sales. It is expected and intended that second party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs, and accessories will be placed with him by all persons in the above described territory. [18]

CLAIMS.

(36) It is further agreed that no claims regarding errors in shipments or billings are to be recog-

nized by first party, unless received in writing by it from the second party within ten days after receipt of the goods by the second party.

CRATING, etc., EXTRA.

(37) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the second party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS.

(38) The first party shall not be liable in any way for delayed shipments of any goods ordered or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE.

(39) The second party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by second party.

DEPOSITS.

(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of eight hundred dollars ($800.00) in cash, and it is agreed that the first party may, at its option, apply any part or all of said amount towards the liquidation of any

past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all the provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED.

(41) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for this said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely: [19]

For his wholesale and retail territory, respectively, as follows:

In August, 1915, wholesale territory..... 22 Autos
In August, 1915, retail territory..... 8 Autos
In September, 1915, wholesale territory.. 16 Autos
In September, 1915, retail territory..... 24 Autos

In October, 1915, wholesale territory..... 2 Autos
In October, 1915, retail territory..... 24 Autos
In November, 1915, wholesale territory... 0 Autos
In November, 1915, retail territory..... 8 Autos
In December, 1915, wholesale territory... 0 Autos
In December, 1915, retail territory..... 8 Autos
In January, 1916, wholesale territory..... 18 Autos
In January, 1916, retail territory..... 16 Autos
In February, 1916, wholesale territory.... 0 Autos
In February, 1916, retail territory..... 8 Autos
In March, 1916, wholesale territory..... 2 Autos
In March, 1916, retail territory..... 38 Autos
In April, 1916, wholesale territory..... 24 Autos
In April, 1916, retail territory..... 24 Autos
In May, 1916, wholesale territory..... 8 Autos
In May, 1916, retail territory..... 16 Autos
In June, 1916, retail territory..... 6 Autos
In June, 1916, wholesale territory..... 8 Autos
In July, 1916, wholesale territory..... 8 Autos
In July, 1916, retail territory..... 0 Autos

REQUISITIONS MAY BE DECLINED.

(42) First party agrees that the foregoing requisitions of the second party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisitions being incurred under any circumstances. And the second party

may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICES MAY BE CHANGED.

(43) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by second party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the second party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which second party may be obligated or owing, either directly or indirectly to the first party.

SUBAGENCIES.

(44) Second party shall appoint a Sublimited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or [20] from time to time be designated by first party, in order that first party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sublimited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such un-

occupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

SUBLIMITED AGENTS' COMMISSIONS.
SUBLIMITED AGENTS' CONTRACTS.

(45) The second party shall allow and pay the Sublimited Agents the regular Limited Agents' commissions on the net volume of business done, and will require each Sublimited Agent to execute the Sublimited Agent's agreement provided in blank by first party in triplicate, and shall within three days after the execution thereof transmit in triplicate said agreement, properly executed, to first party for its approval and signature, and upon being executed by the first party, one copy each shall be delivered and kept by the first party and second party hereto, and said Sublimited Agent. No arrangement or agreement made by second party with any Sublimited Agents shall be in any manner binding upon the first party until it shall have been reduced in writing on such blank aforesaid and approved and signed in triplicate by first party's duly authorized executive officer and delivered as aforesaid, and second party further agrees not to enter into any private arrangement or agreement with any party or parties to act as his Sublimited Agent except as herein provided. All Ford automobiles sold by first party through the Sublimited Agents of the second party, appointed and authorized as aforesaid, shall be considered as taken by the second party as a portion of the Ford automobiles handled by him under this contract.

DEPOSITS OF SUBLIMITED AGENTS.

(46) The first party shall be custodian of all contract deposits made by the Sublimited Agents and of all deposits made by proposed buyers, and in the event of the termination or cancellation of this contract, second party shall have no claim whatsoever, directly or indirectly, against first party for such deposit moneys, whether such deposits are made through the second party or directly by the Sublimited Agents or buyers themselves. When deposit moneys are transmitted to the first party by the second party, second party shall specify whose money the same is, and on what particular contract or Retail Buyer's Order such deposit is being made.

NO ASSIGNMENT.

(47) The second party shall have no right to assign this contract or any interest in the same, without the written consent of the first party.

CANCELLATION.

(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party, and such cancellation shall also operate as [21] a cancellation of all orders for automobiles, automobile parts, or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF TERMINATION.

(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

PERFORMANCE OF SUBLIMITED AGENCY CONTRACTS.

(50) In case of cancellation of this contract first party will carry out all such contracts made with Sublimited Agents under the second party, as were made with the approval of the first party as herein

provided, the intent being that the first party shall take the same off the hands of second party.

TERMINATION.

(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease, and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second part shall have dealt during the currency of this contract.

NO WAIVER OF THESE PROVISIONS.

(52) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the second party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT.

(53) This contract, it is agreed, is a Michigan contract and shall be construed as such. [22]

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signatures of the first party.

FORD MOTOR COMPANY.
By W. A. RYAN–A (L. S.)
Manager of Sales.
Approved F. B. NORMAN,
Branch Manager.
O. K.'d J. S. BECKHARDT,
Accounting.
Ckf. and App. E. W.,
Sales.

Signatures of the second party.

EUGENE FORD AUTO CO. (L. S.)
By F. M. HATHAWAY (L. S.)
Witness: CHAS. E. GODON,
FIRST NATIONAL BANK,
(Name of Limited Agent's Bank.)

Trial Balance July 31, 1915.
C. R. Aug. 13, 1915, Page 15.
C. R. Sep. 9, Page 40.

State of Oregon,
County of Multnomah,—ss.

I, Alva W. Jones, being first duly sworn, depose and say that I am the manager of the Local Branch of the Ford Motor Company located at Portland, Oregon, and the managing agent of the Ford Motor Company for the State of Oregon, and that the foregoing bill of complaint is true, as I verily believe.

ALVA W. JONES.

Subscribed and sworn to before me this 25th day of February, 1918.

[Seal] C. G. BUCKINGHAM,
Notary Public for Oregon.

My commission expires 6/23/20.

[Endorsed]: Filed Feb. 25, 1918. G. H. Marsh. [23]

AND AFTERWARDS, to wit, on the 25th day of February, 1918, there was duly filed in said court a motion for order to show cause and for restraining order, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,

Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Defendants.

Motion for Order to Show Cause and Temporary Restraining Order.

COMES NOW, the plaintiff above named and moves the Court for an order to show cause, requiring the defendants above named and each of them, to appear before this Court on a day certain to be named, and show cause, if any, why they should not be restrained from levying execution upon a certain judgment entered in favor of the defendants and against the plaintiff on the 11th day of September, 1916, by the District Court of the United States for the District of Oregon, pending the determination of

the above-entitled suit, and for a temporary restraining order restraining said defendants, and each of them, from levying execution, upon that certain judgment made and entered in favor of the defendants and against the plaintiff in the District Court of the United States, for the District of Oregon, on the 11th day of September, 1916, and entered in Book 27, page 139, of the Journal Records of the above-entitled [25] court and in support of this motion, submits the affidavit hereto attached.

PLATT & PLATT,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel [26]

Affidavit of Alva W. Jones in Support of Motion for Order to Show Cause and Temporary Restraining Order.

State of Oregon,
County of Multnomah,—ss.

I, Alva W. Jones, being first duly sworn, depose and say that I am the manager of the branch of the Ford Motor Company, plaintiff above named, which is located at Portland, Oregon; that on or about the —— day of May, 1916, the Ford Motor Company paid to the First National Bank of Eugene, Oregon, the sum of $12,676.38, in payment of three promissory notes, bearing date April 22nd, 1916, May 1st, 1916, and May 24th, 1916, respectively; the first of said notes being for the sum of $2800.00, the second of said notes being for the sum of $2800.00, the third of said notes being for the sum of $8400.00, and the sum of $12,676.38 being the balance due upon said notes at the time when the said plaintiff made said

payment, and that the plaintiff made said payment to the First National Bank of Eugene, Oregon, for the purpose of releasing 36 Ford touring cars and 1 Ford Sedan from the lien of three chattel mortgages given to secure the payment of each of said promissory notes, which notes and the said chattel mortgages, creating a lien upon the said automobiles, were executed and delivered to the said First National Bank of Eugene, Oregon, by the defendants above named at a time when said defendants were the agents of the Ford Motor Company for the purpose of selling and distributing Ford cars within certain specified territory in Lane County, Oregon, and that the said payment of the said notes by the plaintiff above named to the First National Bank of Eugene, Oregon, was so made by the plaintiff for the purpose of releasing said automobiles from the chattel lien which had been imposed thereon by the defendants above [27] named during the period of time when they were the agents of the Ford Motor Company in a portion of Lane County, Oregon, and that the said defendants received the face value of said notes from the First National Bank of Eugene, Oregon, and likewise received the benefit of the payment of said $12,676.38, so made by the plaintiff above named as their principal, and said defendants at all times refused to pay to the plaintiff above named the said sum of $12,676.38, or any portion thereof, and I am informed and believe, and therefore allege the fact to be that the defendants are at the present time insolvent and that if they are not restrained from levying execution against the plaintiff above named on

the judgment of this Court in the sum of $22,146.05, which they now hold against the plaintiff, that plaintiff will be unable to recover from said defendants the sum of $12,676.38, or any portion thereof, and I further allege that no consideration has passed from the plaintiff to the defendants or from the defendants to the plaintiff for the payment of the said sum of $12,676.38, which payment of money was made by the plaintiff above named for the purpose of releasing its property from the chattel lien which the defendants, as its agents, had imposed thereon.

I further depose and say that the contract of agency existing between the plaintiff and the defendants at the time when the said payment of $12,676.38 was made by the plaintiff to the First National Bank of Eugene, Oregon, was the regular form of contract used by the Ford Motor Company in the years 1915 and 1916 in the creation of limited agencies for the sale of its automobiles, and is the same contract, the validity of which was determined by the Circuit Court of Appeals for the [28] Ninth Circuit in the case of Ford Motor Company vs. Benjamin E. Boone et al.

ALVA W. JONES.

Subscribed and sworn to before me this 25th day of February, 1918.

[Seal] C. G. BUCKINGHAM,
Notary Public for Oregon.

My commission expires 6/23/20.

[Endorsed]: Filed Feb. 25, 1918. G. H. Marsh. [29]

AND AFTERWARDS, to wit, on Monday, the 25th day of February 1918, the same being the 96th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [30]

Return on Service of Writ.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed order to show cause on the thereinnamed V. W. Winchell and F. M. Hathaway by handing to and leaving a true and correct copy thereof with V. W. Winchell and F. M. Hathaway personally at Eugene in said district on the 26th day of February, 1919, A. D. 191—.

G. F. ALEXANDER,
U. S. Marshal,
By R. D. CARTER,
Deputy. [31]

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Order to Show Cause.

Now, at this time this cause came on to be heard on motion of the plaintiff above named for an order to show cause requiring the defendants above named, and each of them, to appear before this Court on a day certain, and show cause, if any, why they should not be restrained during the pendency of this suit from levying execution on the property of the plaintiff above named, upon a judgment of this court entered upon the 11th day of September, 1916, in favor of the defendants and against the plaintiff, which judgment is recorded in Book 27, page 139 of the Journal Records of this court, and for a temporary restraining order restraining said defendants from so levying said execution during the pendency of a hearing on such order to show cause, and

IT APPEARING TO THE COURT upon the motion of the plaintiff, and from the affidavit submitted

in support thereof that this is a proper cause in which to issue such an order. [32]

IT IS HEREBY CONSIDERED AND ORDERED that the defendants above named and each of them, appear before this Court on the 4th day of March, 1918, at 10 A. M., and show cause, if any, why an injunction should not be issued restraining them, during the pendency of this suit, from issuing execution against the property of the plaintiff above named on that certain judgment entered by this Court in favor of the defendants and against the plaintiff on the 11th day of September, 1916, which judgment is recorded in Book 27, page 139 of the Journal Records of this court, and

IT IS FURTHER ORDERED, that said defendants and each of them, be, and they are hereby, restrained from issuing execution against the property of the plaintiff upon said judgment, pending further order of this Court.

Dated this 25th day of Feb., 1918.

R. S. BEAN,
Judge.

[Endorsed]: Filed Feb. 25, 1918. G. H. Marsh. [33]

AND AFTERWARDS, to wit, on the 16th day of March, 1919, there was duly filed in said court, an answer, in words and figures as follows, to wit: [34]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Answer.

Come now the defendants and for their answer to the Bill of Complaint of the Ford Motor Company, a corporation, plaintiff, filed against these defendants, and now and at all times hereinafter saving and reserving to these defendants all manner of benefit and advantage which can or may be had or taken to the many errors, uncertainties and insufficiencies in said bill of complaint contained, for their answer thereto say:

These defendants and each of them answering said complaint says, admits, denies and alleges as follows, to wit:

I.

Admits that during all the time in the Bill of Complaint mentioned the plaintiff was, and still is a corporation incorporated, organized, and existing under

and by virtue of the laws of the State of Michigan, with its factory and place of business at Highland Park, Michigan, and has conformed to the laws of the State of Oregon, authorizing foreign corporations to do business within the State of Oregon, and is a citizen and resident of the State of Michigan. [35]

II.

Admits that during all the time in the bill of complaint mentioned, the defendants, V. W. Winchell and F. M. Hathaway, were copartners, doing business under the firm name and style of "Eugene Ford Auto Company" in the city of Eugene, State of Oregon, and were and still are, citizens of the State of Oregon.

III.

Denies that on or about the 10th day of September, 1915, or at all the plaintiff and defendants entered into a contract known as a "Limited Agency Contract" wherein or whereby the plaintiff appointed the defendants as its limited agents within certain territory in the State of Oregon, for the purpose of negotiating sales of Ford automobiles to users only, which said contract further provided that the same should remain in force or govern all transactions between the parties until July 31, 1916, upon the condition, however, that either party might be at liberty to terminate said contract upon written notice by registered mail at any time with or without notice. Admits that the plaintiff and defendants did enter into a contract, a copy of which is attached to

plaintiff's bill of complaint, marked Exhibit "A" and therein referred to.

IV.

Denies that on or about the 25th day of May, 1916, or at all, the plaintiff, acting under or in accordance with the provisions of said or any contract of agency terminated said agency contract by letter, duly registered or forwarded to the defendants, through the mails of the United States, or was ready, able, or willing to perform all or any of the conditions of [36] said alleged cancellation as in said alleged contract required.

V.

Deny that at the time of said alleged cancellation of said alleged contract these defendants had in their possession *thirty* (36) touring cars or any touring cars and one Sedan, which had been consigned to these defendants under or in accordance with the provisions or upon the conditions, set forth in said alleged agency contract.

VI.

Admits that on or about the 22d day of April, 1916, and on or about the 1st day of May, 1916, and on or about the 24th day of May, 1916, respectively, the defendants borrowed from the First National Bank of Eugene, Oregon, the sum of Fourteen Thousand ($14,000.00) Dollars, but denies that said sum was borrowed prior to any alleged cancellation of said alleged contract. These defendants deny that said sum was procured in any way except as a loan to them upon their credit and property in the usual course of business. Admits that said loan was evi-

denced by their promissory notes, bearing date the 22d day of April, 1916, the 1st day of May, 1916, and the 24th day of May, 1916, respectively, and that each of which sum was secured by a chattel mortgage upon thirty-six (36) Ford cars and one Sedan car, but denies that said cars or any of them or said Sedan belonged to the plaintiff and denies that plaintiff had any right, title or interest in said automobiles, but avers that the same belonged to and were the property of defendants. Denies that said sums of money or any part thereof were in form so procured from the First National Bank of Eugene, Oregon, or procured in any form other than as a *bona fide* borrower upon property owned by defendants in the usual course of business. Denies that in truth or in fact the defendants, in obtaining [37] said sums of money or in executing or delivering said notes on said chattel mortgage to secure the payment of the same, were acting as the agents of the plaintiff under or in accordance with the provisions of said alleged contract referred to in paragraph III of the bill of complaint of any contract at all. Denies that defendants, after procuring said sums of money as the agents of the plaintiff or at all in any fiduciary, contractual or representation capacity with reference to the plaintiff, converted the same or any part thereof to their own use or benefit.

VII.

Admits that on or about the —— day of ——, the plaintiff paid to the said First National Bank of Eugene, Oregon, the sum of $12,676.38, and admits that the lien created by said chattel mortgage as de-

fendant's property was at said time released by said voluntary payment and admits that said last above named sum was the amount due on the three notes given by defendants to said bank. Denies that plaintiff procured from said bank a release of the lien created by defendants, its agents, upon said or any automobiles in manner set forth in paragraph VI of the bill of complaint or in any manner. Denies that plaintiff made such payments or any payment to said First National Bank of Eugene, Oregon, of said sum of $12,673.38 *of* any sum, because the defendants had refused to make such payment or by such payment release said or any automobile from the lien or any lien so created therein by the defendants. Denies that defendants as the agents of plaintiff have received or still have in their possession the sum of $12,676.38 or any part thereof so received from said First National Bank of Eugene, Oregon. Admit that defendants have refused and still refuse to pay plaintiff, with or without demand, a sum of $12,676.38 or any part thereof. Denies that plaintiff has paid said or any sum of money procured or borrowed from said bank by the [38] defendants or either of them as agents of the plaintiff. Denies that plaintiff has secured from said bank a release of the or any lien imposed upon said or any automobiles which were owned by plaintiff at the time when said chattel lien was imposed thereon by the defendants as the agents of the plaintiff and denies that any payment was made by plaintiff to said First National Bank of Eugene with reference to said $12,676.38, except as a voluntary payment. Denies that defend-

ants or either of them have received the sum of $12,676.38 or a double payment of said amount on said notes. Denies that defendants have been doubly paid. Denies that defendants or either of them have received the possession of the sum of $12,676.38, which in equity or good conscience belongs to the plaintiff, or that the amount of money so paid by plaintiff to said bank as in paragraph III*I* of the complaint set forth, constituted a portion of the amount of money to which the defendants were entitled under or by virtue of the terms of the agreement referred to in paragraph III of the complaint or any agreement by way of tender upon the cancellation of said or any contract by the plaintiff as in paragraph IV of the complaint alleged. Denies that plaintiff has made an offer in writing or at all to pay to defendants the particular or any sums of money to which the defendants are entitled by reason of the cancellation by plaintiffs of the contract set forth in paragraph III of the complaint or any contract except that plaintiff has attempted to claim a setoff against a judgment obtained by defendant against plaintiff in a cause in this court where plaintiff herein was plaintiff therein and defendants herein were defendants therein, a certain voluntary payment of $12,676.38 made by plaintiffs to the First National Bank of Eugene, Oregon, which claim setoff was refused and denied by this Court. Admits that defendants have at all times refused to accept the offer of setoff claimed by plaintiff. Denies that plaintiff has made any offer in writing to pay the particular sums of money to which [39] defendants are en-

titled by reason of any contract heretofore or at any time existing between plaintiff and defendant or by reason of the cancellation thereof, which offer the defendants have at all times or at any time, refused to accept or which offer the plaintiff has at all times or at any time been ready or willing to carry out except in an attempt to offset the judgment as aforesaid.

VIII.

Denies that the defendants, or either of them, are at the present time or at all, insolvent or have no means whereby to satisfy the payment of said sum of money or any portion thereof so claimed to be due or owing from the defendants to the plaintiff. Defendants and each of them aver that they are now and at all times in the Bill of Complaint mentioned were solvent.

IX.

Admits that on or about the 11th day of September, 1916, the defendants obtained a judgment in the District Court of the United States for the District of Oregon, against the plaintiff in the sum of $22,146.05, and that said defendants are about to obtain execution upon said judgment, and levy the same upon the property of the plaintiff. Denies that if said defendants are allowed to proceed with said levy, the plaintiff will be deprived of any lawful method of obtaining the payment from the defendants of the sum of $12,676.38 to the plaintiffs' great or irreparable damage. Denies that plaintiff has at all times since any prior time been ready, or willing to pay to the defendants the amount of said judgment or any part thereof and denies that plaintiff has at any

time been ready or willing to pay to the defendants the amount of said judgment, less the sum of $12,-676.38 except as an attempted offset against said judgment. [40]

X.

Admits that this is a controversy between citizens of different States and that it involves more than $3,000.00 exclusive of costs.

XI.

Denies that plaintiff has no plain, speedy or adequate remedy at law but only in equity.

XII.

These defendants and each of them deny each and every other allegation contained in each of the paragraphs of said complaint, except as hereinbefore expressly admitted, and except as hereinafter alleged.

Further answering the said bill of complaint, and for a further and separate answer thereto, these defendants allege:

I.

That on the 10th day of September, 1915, and for some time prior thereto these defendants were engaged in business at Eugene, Oregon, as copartners in carrying on an automobile business and garage business, and automobile repair shop, and in selling automobile accessories, oils, gasoline, tires and other articles used in connection with automobiles and the repairs thereof; and were then doing business under the name and style of Eugene Ford Auto Company as copartners. [41]

II.

That on or about the 10th day of September, 1915,

these defendants signed a contract with the plaintiff, and a copy of which is attached to the said complaint as Exhibit "A," and by this reference is made an integral part of this answer.

That on or about the 25th day of May, 1915, the plaintiff sent a notice to these plaintiffs wherein and whereby the plaintiff claimed the right to cancel the said contract, and without complying with any of the provisions of said contract with reference to the cancellation of the same; and this plaintiff did not in fact comply with the provisions of said contract with reference to the cancellation of the same.

III.

That on the 22d day of April, 1916, and for more than a year prior thereto, and ever since that time these defendants did their banking business with the First National Bank of Eugene, Oregon; and at all of said times had a credit with said bank, so that they were able to and did borrow large sums of money from said bank on their individual credit from time to time when they required the use of cash in their said business, and were accustomed to and did borrow money from the said bank on their individual credit; and on the 22d day of April, 1916, the said First National Bank of Eugene, Oregon, held the promissory notes of these defendants executed by these defendants as individuals for the aggregate amount of Fourteen Thousand Dollars ($14,000.00); and which said notes were as follows: One note being executed by V. W. Winchell and F. M. Hathaway as payors in favor of the First National Bank of Eugene, Oregon, as payee, bearing date the 22d day

of April, 1916, and being for the principal sum of Twenty-eight Hundred Dollars [42] ($2,800.00), bearing interest at the rate of eight per cent (8%) per annum, and on which these defendants had paid on the 29th day of May, 1916, the sum of Three Hundred and Fifty Dollars ($350.00); and one note for the principal sum of Twenty-eight Hundred Dollars ($2,800.00) being dated the 1st day of May, 1916, and being executed by V. W. Winchell and F. M. Hathaway as payors in favor of the First National Bank of Eugene, Oregon, as payee, and on which the said V. W. Winchell and F. M. Hathaway paid on the 5th day of May, 1916, Three Hundred and Fifty Dollars ($350.00) and on the 12th day of May, 1916, the further sum of Three Hundred and Fifty Dollars, and on the 24th day of May, 1916, the further sum of Three Hundred and Fifty Dollars ($350.00); one note being dated May 24, 1916, for the principal sum of Eight Thousand Four Hundred Dollars ($8,400.00), and bearing interest at the rate of eight per cent (8%) per annum and which was executed and delivered by the said V. W. Winchell and F. M. Hathaway as payors in favor of the First National Bank of Eugene, Oregon, as payees.

That the said notes were given said bank in the ordinary course of business from these defendants and represented moneys loaned these defendants by said bank upon the individual credit of these defendants, and not otherwise.

IV.

That on or about the 27th day of May, 1916, in order to secure said note of Eight Thousand Four

Hundred Dollars ($8,400), these defendants made, executed and delivered to said bank a chattel mortgage covering twenty-four (24) touring cars; and on or about the 2d day of June, 1916, these defendants in order to secure to said bank the payment of each of said promissory notes for Twenty-eight Hundred Dollars ($2,800.00) hereinbefore described, made, executed and delivered to said bank two separate chattel mortgages each of which covered eight (8) automobiles.

That at the time these defendants made the said three chattel mortgages to said bank, these defendants were the owners of [43] said automobiles and said automobiles were fully paid for by these defendants.

V.

That this plaintiff on or about the 27th day of May, 1916, commenced an action at law in the United States District Court for the District of Oregon against these defendants wherein the plaintiff in said action, and being the plaintiff in this suit, claimed to be the owner and entitled to the exclusive and immediate possession of certain automobiles; and the said action so commenced was an action of replevin, and the plaintiff herein and therein caused a writ of replevin to be issued out of said court in said action and placed the same in the hands of the United States Marshal for the District of Oregon, and caused the said United States Marshal by virtue of said writ of replevin to seize the said automobiles and take possession of the same under and by virtue of the said writ of replevin, and deliver the same

to the plaintiff herein and therein; and a copy of the complaint upon which said action was tried is hereinafter set forth, is attached hereto and marked Exhibit "A" and made a part hereof. And to the said complaint in said action these defendants filed their answer, a copy of which answer is attached hereto and marked Exhibit "B," and by this reference made a part hereof; and said answer was thereafter amended by adding allegations showing the diversity of citizenship of said parties to said cause. And to the said answer the plaintiff herein and therein on the 28th day of July, 1916, filed its reply denying the allegations of said answer; and a copy of which reply is attached hereto and marked Exhibit "C," and by this reference made a part hereof. [44]

VI.

And issue being joined in said action as aforesaid, a trial was had during the month of September, 1916, of said action in the said District Court of the United States for the District of Oregon; and as a result of said trial a judgment was duly rendered in said action against the plaintiff and in favor of these defendants on the 11th day of September, 1916; and said judgment after giving the title of said cause was and is as follows, to wit:

"Thereupon, on motion of said defendants for judgment on the verdict heretofore filed and entered herein,

IT IS CONSIDERED that said defendants V. W. Winchell and F. M. Hathaway, copartners doing business as the Eugene Ford Auto Company, do have

and recover of and from the plaintiff, Ford Motor Car Company, a corporation, the immediate possession and return of the Ford automobiles described in the complaint and answer herein, and being the following numbered Ford automobiles, to wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 106,7484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

AND IT IS FURTHER ORDERED that in case return of said automobiles cannot be had that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as the Eugene Ford Auto Company, do have and recover of and from the said plaintiff Ford Motor Car Company, a corporation, the sum of $16,077.50, the value of the said automobiles, and

IT IS FURTHER CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as [45] the Eugene Ford Auto Company, have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, damages in the sum of $6,000.00, together with costs and disbursements herein taxed at $68.55.

Whereupon, on motion of said plaintiff, IT IS ORDERED that it be and it is hereby allowed thirty days from this date within which to file a motion to set aside said judgment and for a new trial herein, and in which to submit a bill of exceptions, and

IT IS FURTHER ORDERED that issuance of execution upon the said judgment be stayed until after the termination of the said motion for new trial.

R. S. BEAN,
United States District Judge.

Filed September 11, 1916. G. H. Marsh, Clerk."

VII.

That in said action the plaintiff herein, and being the plaintiff therein, offered in evidence the said promissory notes hereinbefore mentioned and described, and being the promissory notes referred to and described in the complaint herein, which had been given by these defendants to the said First National Bank of Eugene, Oregon, and the said notes were received in evidence with evidence claiming to show that the plaintiff herein and therein had voluntarily paid the amount then due on said promissory notes amounting to $12,676.38 to the said bank; and in said action, the plaintiff herein and therein claimed that the amount so paid the bank, to wit, the amount then due on said notes, should be offset against the defenses and counterclaims pleaded by these defendants in their said answer in said action; and in said action these defendants offered evidence and such evidence was received to the effect that these defendants were the owners of the said automobiles described in the pleadings in said cause, and which are the same automobiles described in the complaint in this suit and in the pleadings herein. [46]

And in said action these defendants were given judgment against the plaintiff for the value of said automobiles, to wit, the sum of Sixteen Thousand

Seventy-seven Dollars and 50 Cents ($16,077.50), and which was the amount these defendants had paid the plaintiff herein and therein for the said automobiles, and as adjudicated and determined in said action, together with the further sum of Six Thousand Dollars ($6000.00) damages sustained by these defendants on account of the wrongful taking of the said automobiles by the plaintiff therein and herein under the said writ of replevin; and in said action it was adjudicated and determined that the plaintiff in this suit had voluntarily paid to the said First National Bank of Eugene, Oregon, without the knowledge or request of these defendants, the said sum of Twelve Thousand Six Hundred Seventy-six and 38/100 dollars ($12,676.38), and that said payment was made voluntarily and was a voluntary payment on the part of the plaintiff herein and therein to said bank; and it was adjudicated and determined in said action that the plaintiff therein and herein was not entitled to set off said sum against the defenses and counterclaims pleaded in the defendants' answer in said action; and it was adjudicated and determined that these defendants were the owners of and had the exclusive right to the possession of the said automobiles and to the return thereof, and that in case a return of said automobiles could not be had that these defendants should have and recover of and from the plaintiff therein and herein the said sum of Sixteen Thousand Seventy-seven and 50/100 Dollars ($16,077.50), the value of said automobiles.

VIII.

That after said judgment was rendered, as afore-

said, and to wit, on or about the 8th day of November, 1916, the plaintiff therein and herein filed a petition for a new trial or modification of said judgment in the District Court of the United States for the District of Oregon in said action, and a [47] copy of which petition is attached hereto, marked Exhibit "D" for reference and made a part hereof, as though the same were fully set forth herein.

That in said motion aforesaid, the plaintiff in said action, and being the plaintiff herein, moved the District Court of the United States for the District of Oregon, to offset against the said judgment and particularly against the sum of $16,077.50 awarded these defendants, as aforesaid, the said sum of Twelve Thousand Six Hundred Seventy-six and 38/100 Dollars ($12,676.38) and being the amount of money claimed to have been paid by the plaintiff herein and therein to the First National Bank of Eugene, Oregon, in payment and discharge of the notes described in this bill of complaint herein, and given to the First National Bank of Eugene, Oregon, by these defendants. And the said motion came on regularly to be heard in said action in the District Court of the United States for the District of Oregon, and said Court on or about the 2d day of January, 1917, duly made and entered an order in said action denying the said motion, and thereby and in the proceedings in said action prior thereto, as aforesaid, it was fully determined, adjudicated, and adjudged by the said District Court of the United States for the District of Oregon in said action wherein the plaintiff herein was the plaintiff therein, and the defendants herein

were the defendants therein, that this plaintiff was not entitled to offset the said sum of $12,676.38 or any part thereof against the defenses and counterclaims of these defendants in said action and against the said judgment rendered in said District Court of the United States for the District of Oregon in favor of these defendants and against this plaintiff, and which is the judgment referred to in said bill of complaint of the plaintiff herein in Paragraph IX thereof filed herein against these defendants, and which said judgment and which said order denying the modification thereof was not appealed from and is in full force and effect and is a final [48] judgment and order of said District Court of the United States for the District of Oregon.

IX.

Defendants further answering allege that the plaintiff in this suit, being the plaintiff in said action of replevin hereinbefore described, prosecuted a writ of error from the District Court of the United States for the District of Oregon in said action to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit of the United States, and said appeal was duly heard and determined by said United States Circuit Court of Appeals, and the judgment of said Circuit Court of Appeals was duly rendered affirming the said judgment of this Court, the District Court of the United States for the District of Oregon; and the opinion of the said Circuit Court of Appeals in said action was duly filed in said Court on the 1st day of October, 1917; and in the said opinion the said Circuit Court of Appeals and upon

the record presented by said writ of error prosecuted by the plaintiff in said action, and upon said appeal, determined and decided that the allegation in paragraph 4 of this bill of complaint to the effect that the plaintiff in this suit was ready and willing to perform all the conditions of the alleged cancellation of the said contract mentioned in Paragraph IV was not true, and in said action, of replevin it was claimed by this plaintiff that it had duly and lawfully canceled the contract pleaded in said bill of complaint herein as Exhibit "A," and evidence was offered and received by the parties to said action of replevin, as aforesaid, on the issues tendered therein with respect to the alleged cancellation of the contract referred to as Exhibit "A" in the bill of complaint herein; and upon said evidence it was duly adjudged and determined in said action that the plaintiff therein and herein had not complied]49] with the provisions of said contract with respect to the requirements therein contained by virtue of which it claimed it was entitled to cancel the said contract and the said matter was fully adjudicated, determined, and adjudged in said action, as shown by the opinion and judgment of the said Circuit Court of Appeals in said action, and which said opinion is reported in the Federal Reporter in Vol. 245 thereof at page 85; and thereafter the said Circuit Court of Appeals duly and regularly issued its Mandate in said action, which said Mandate has been duly entered of record in the District Court of the United States for the District of Oregon, and the judgment thereon is of record in this said court; the District

Court of the United States for the District of Oregon, and is in full force and effect; and this suit is attempted to be and is brought against the issuance of an execution on said judgment and by reason of the foregoing matters alleged, as aforesaid, with respect to said adjudications, these defendants plead by reason of the premises, as hereinbefore set forth, that all of the matters and things pleaded in the said bill of complaint in this suit, and on account of which this cause of suit is brought, are *res adjudicata,* and were fully litigated, tried, determined, and adjudged in the District Court of the United States for the District of Oregon; and on the writ of error from this Court, and in said action, as aforesaid, and in a cause wherein the said courts had jurisdiction of the subject matter hereinbefore referred to, and of the parties to said cause and of said cause.

X.

That these defendants further answering allege that they are now and were at the time this suit was commenced, and for a long time prior thereto, copartners engaged in the automobile and garage business at Eugene, Oregon, and were so engaged in said business at Eugene, Oregon, for about a year prior to the commencement of this suit; and at the time of the commencement of this suit had duly and regularly filed their assumed business name as copartners according [50] to the laws of the State of Oregon in such case made and provided, and which assumed business name is the Pacific Auto Company; and these defendants during all of said times were and now are carrying on said business as a going

concern and were and are individually and as individuals and as copartners entirely solvent and said copartnership was and is entirely solvent, as aforesaid, at the time of the commencement of this suit, and for a long time prior thereto and now; and plaintiff knew such to be the facts at the time the plaintiff commenced this suit and knew that these defendants were and are solvent, as aforesaid.

XI.

And these defendants not confessing or admitting that any matter, cause, or thing in the said bill contained and not hereby sufficiently answered is true, deny that the plaintiff and complainant is entitled to any relief against them by reason of any matter in the said bill contained, and prays to be hence dismissed with their costs in this behalf sustained.

CHARLES A. HARDY,
LOGAN & SMITH,
Attorneys for Defendants.

United States of America,
State of Oregon,
County of Lane,—ss.

I, V. W. Winchell, being first duly sworn, on oath depose and say: That I am one of the defendants in the above-entitled suit, and that the foregoing answer to the bill of complaint herein is true, as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 13th day of March, 1918.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921. [51]

Exhibit "A" to Answer.

(Omitting Title.)

AMENDED COMPLAINT.

Plaintiff complains and for cause of action alleges:

I.

That it is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and principal place of business at Highland Park, Michigan, and duly authorized to transact business as a foreign corporation in the State of Oregon, with a factory branch and principal place of business in the State of Oregon in Portland, Multnomah County, Oregon.

II.

That E. A. Farrington and L. A. Houck are copartners doing business under the firm name and style of Pacific Transfer Company, and are engaged in the warehouse and transfer business in the city of Eugene, Oregon.

III.

That H. Sandgathe is an individual doing business as the Springfield Garage, and is in the automobile business at Springfield, Oregon.

IV.

That V. W. Winchell and F. M. Hathaway are copartners doing business as the Eugene Ford Auto

Company, and are in the automobile business at Eugene, Oregon.

V.

That A. Wilhelm and John Doe Wilhelm are copartners doing business as A. Wilhelm & Son, and are in the automobile business at Junction City, Oregon.

VI.

That heretofore and on or about September 10th, 1915, plaintiff and defendants V. W. Winchell and F. M. Hathaway entered into a contract whereby said defendants were to represent [52] the plaintiff as limited agents. Pursuant to said contract plaintiff consigned to the said defendants in this paragraph mentioned the following numbered Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066343, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067615, Sedan 658934, 1116486.

VII.

That thereafter, plaintiff pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly canceled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above-mentioned defendants to said defendants in payment and satisfaction as provided for in said contract; and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time

of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing, and able to pay the sum of thirty-four hundred and one and 12/100 dollars ($3401.12), which amount is the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings said sum of thirty-four hundred and one and 12/100 dollars into this court in this action, ready to be paid to defendants.

VIII.

That the amount involved in this action is in excess of three thousand dollars, and within the jurisdiction of this court.

IX.

That at the time of the commencement of this action said automobiles above described are within the State of Oregon and the jurisdiction of this Court, and in the possession of the [53] defendants herein; and that the plaintiff is the present owner and entitled to the immediate possession of said automobiles; that demand has been made upon the defendants for the possession of said automobiles and defendants have refused to give plaintiff possession of said automobiles.

X.

That said automobiles are of the value of Sixteen Thousand Seventy-seven and 50-100 Dollars ($16,077.50).

Wherefore plaintiff demands judgment against the defendants for the recovery of Ford automobiles as particularly set forth in Paragraph VI of this com-

plaint, or for $16,077.50, the value thereof; $1,000.00 damages for the detention thereof; and for the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the plaintiff's attorney in the above-entitled action, and that the foregoing proposed amended answer is true, as I verily believe; that I make this verification because the attorney in fact is without the State, and I am acquainted with the facts.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 14th day of August, 1916.

(Sgd.) HOMER T. SHAVER,
Notary Public for Oregon.

My commission expires July 19, 1920.

Filed August 14, 1916. G. H. Marsh. Clerk. [54]

Exhibit "B" to Answer.

(Omitting Title.)

ANSWER.

Come now the defendants and answering the complaint herein admit the allegations contained in Paragraph I, in Paragraph II, in Paragraph III, in Paragraph IV, and in Paragraph V of the Complaint herein.

Deny each and every other allegation contained in said complaint except as hereinafter expressly ad-

mitted, and except as hereinafter alleged.

For a further and separate answer and defense to said complaint these defendants allege that V. W. Winchell and F. M. Hathaway prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff, and no further payments were to be made thereon; and, thereupon, the plaintiff delivered said automobiles to defendants and title to the same passed from plaintiff to defendants, and defendants became the owners thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and are now, the owners thereof, and entitled to the immediate and exclusive possession of the said automobiles.

For a further and separate answer and defense to said complaint, the defendants V. W. Winchell and F. M. Hathaway, reallege all of the allegations contained in the first answer contained herein, and these defendants further allege that ever since the contract mentioned in the complaint was made between plaintiff and these defendants, plaintiff has dealt with these defendants in the sale of automobiles, so that when the defendants paid to plaintiff the amount required to take up the bill of lading sent for collection by the plaintiff with the automobiles delivered by plaintiff to defendants, and paid the [55] freight and draft attached to such bill of lading, delivery was made of said automobiles to defendants and such drafts were drawn by plaintiff against defendants for

the full sum required to be paid by defendants to plaintiff as the purchase price of said automobiles, and upon such payment and delivery plaintiffs have received said automobiles and dealt with the same as their own, with the knowledge and acquiescence of plaintiff; and the contract between plaintiff and defendants ever since the same was made has been construed by the parties, the same being the contract under which plaintiff sold and defendants purchased the said automobiles, so that upon payment of such sight drafts and the delivery of the automobiles upon the payment of the same and the freight, title and delivery to such automobiles was completed and passed from plaintiff to defendants and that all of the automobiles mentioned in the complaint were purchased from plaintiff and paid for by defendants upon the terms hereinafter set forth; and long prior to the institution of this action, and not otherwise; and that at the time of the commencement of this action and for a long time prior thereto defendants were and are the exclusive owners of said automobiles and each one of the same and entitled to the immediate and exclusive possession thereof, and were in the lawful possession thereof at the time of the commencement of this action.

For a third further and separate answer and defense these defendants allege the truth to be; That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the

plaintiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defendants V. W. Winchell and F. M. Hathaway all claims of title on the part of plaintiff to the automobiles described in the complaint and each and [56] every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof.

For a fourth further and separate answer and defense and counterclaim the defendants V. W. Winchell and F. M. Hathaway allege that during all of the times mentioned herein they were, and now are, copartners doing business under the firm name and style of Eugene Ford Auto Company, and had duly registered their assumed business name with the County Clerk of Lane County, Oregon, and were engaged in a general automobile business in Lane County, Oregon, and engaged in buying and selling Ford Automobiles, parts, fixtures, accessories, supplies and materials used in said business and incident thereto.

That at the time of the commencement of this action these defendants were, and are now, the owners of the Ford automobiles mentioned in the complaint and being automobiles numbered and specifically designated in Paragraph VI of the complaint, and being Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062232, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377,

1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

That said automobiles were and are of the value of $493.25 for each of said cars, except for the Sedan which was and is of the value of $798.25.

That the defendants at the time of the commencement of this action, as such owners of said automobiles, were entitled to the immediate and exclusive possession of the same; and on or about Monday, the 5th day of June, 1916, the plaintiff instituted the above cause and wrongfully and unlawfully and maliciously caused the writ of replevin to be issued out of this Court and filed an affidavit and bond thereon and demanded the immediate possession of the said automobiles; and at the said time the plaintiff well knew that said automobiles and each and every one thereof, were the exclusive property of these answering [57] defendants, V. W. Winchell and F. M. Hathaway; and that said defendants were entitled to the immediate and exclusive possession thereof, and plaintiff caused said writ of replevin to be issued herein and the said automobiles to be seized maliciously, wrongfully and unlawfully for the purpose of destroying the business of these defendants and injuring their financial standing and credit and depriving them of said property of the value of $18,555.25 as aforesaid, and to drive them out of business and to prevent them from conducting their automobile and garage business hereinbefore described.

That at said time these defendants had an established business in dealing in automobiles, accessories,

appurtenances and supplies from which they were then making and had been making for several months last past a regular profit of approximately Three Hundred Dollars per month.

That by the wrongful acts of the plaintiff, as herein alleged the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of Twenty Five Thousand Dollars, in addition to the general damages hereinbefore set forth, to wit; value of the automobiles and the property aggregating $18,555.25.

That the plaintiff is a corporation of great wealth and extensive business associations and power in the commercial world, and in committing the acts herein set forth, it has used its wealth, standing and power to harass and annoy these defendants by the issuance of legal process to which plaintiff knew its was not entitled.

WHEREFORE, defendants demand judgment that the defendants V. W. Winchell and F. M. Hathaway have judgment against the plaintiff for the recovery of the Ford automobiles, as particularly set forth in the answer herein, or for $18,555.25, the value thereof; and for Twenty-five Thousand Dollars damages; and for their costs and disbursements [58] in this action.

I. N. SMITH,
L. BILYEU and
THOMPSON & HARDY,
Attorneys for Defendants.

State of Oregon,
County of Lane,—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action; and that the foregoing answer is true as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 13th day of June, 1916.

[Notarial Seal] HELMUS W. THOMPSON,
Notary Public for the State of Oregon.

My commission expires March 27, 1917.

Filed June 14, 1916. G. H. Marsh, Clerk. [59]

Exhibit "C" to Answer.

(Omitting Title.)

REPLY.

Comes now the plaintiff, Ford Motor Company, a corporation, and for reply to the first further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained, which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff replying to the second further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff replying to the third further and separate answer and defense of the defendants denies the same, and the whole thereof, except as to

the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the fourth further and separate answer and defense of the defendants denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

WHEREFORE, plaintiff having fully replied to the further and separate answers and defenses of the defendants, prays judgment as heretofore asked for in the complaint on file herein.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the attorney for plaintiff corporation in the above-entitled action and that the foregoing reply is true, as I verily believe. I further state that I have personal knowledge of the facts herein contained and verify this reply for the reason that the proper officer for service of this corporation is not now within the State.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 28th day of July, 1916.

(Sgd.) F. C. McDOUGAL,
Notary Public for Oregon.

My commission expires July 1, 1920. [60]

Exhibit "D" to Answer.

(Omitting Title.)

Comes now the plaintiff in the above-entitled action appearing by Messrs. Platt and Platt and E. L. McDougall, its attorneys of record, and petitions the court for a new trial in the above-entitled action and for grounds of such petition alleges:

I.

That it appears from the undisputed testimony introduced upon the trial of the above-entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants, V. W. Winchell and F. M. Hathaway, aggregating the sum of $12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above-entitled action which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the Court failed and refused to instruct the jury at the trial of the above-entitled action that the plaintiff was entitled to offset the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above-entitled action upon the further ground that the ver-

dict of the jury made and entered in the above-entitled action, and the judgment entered thereon contravenes the instructions given by the Court upon the trial of the above-entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of $16,077.50, and said judgment is contrary to the evidence introduced upon the trial of the above-entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause [61] and the law applicable to the facts proven as evidenced by the instructions of the Court made upon the trial of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above-entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its rights to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above-entitled cause upon which any claim for damages for the sum of $6000, or any sum in excess of $2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above-entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, has sold their business to a third party at or about the time of the cancellation of their con-

tract with the plaintiff in the above-entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above-entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above-entitled cause.

IV.

Plaintiff further petitions the Court for an order modifying the judgment entered in the above-entitled cause on the —— day of September, 1916, by offsetting against the sum of $16,077.50 therein awarded to the defendants in lieu of the machines sought to be replevined in the above-entitled action the sum of $12,676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to The First National Bank of Eugene, Oregon, as [62] payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevined in the above-entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above-entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of $2,800 bearing date April 22d, 1916; the second note being in the sum of $2,800 bearing date of May 1st, 1916, and the third

note being in the sum of $8,400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevined in the above-entitled action, in order to free the property involved in the above-entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this Court modifying the judgment heretofore entered in the above-entitled cause on the —— day of September, 1916, by striking therefrom the sum of $6,000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above-entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above-entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants, V. W. Winchell and F. M. Hathaway, and that no evidence was issued upon the trial of the above-entitled cause upon which [63] any claim or judgment for damages in the sum of $6,000 could properly be based, and that such allowance of $6,000 for damages, or

any other sum in excess of $2,414.75 is in contravention of the instructions of the Court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further ground that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendant's contract with the plaintiff in the above-entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff.

Filed 8th day of November, 1916. G. H. Marsh, Clerk. [64]

AND AFTERWARDS, to wit, on the 16th day of March, 1918, there was duly filed in said court, an affidavit of Luke L. Goodrich, F. M. Hathaway, V. W. Winchell and P. E. Snodgrass in words and figures as follows, to wit: [67]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Affidavit of Luke L. Goodrich in Support of Motion to Dissolve Restraining Order.

United States of America,
State of Oregon,
County of Lane,—ss.

I, Luke L. Goodrich, being first duly sworn on oath, depose and say that I am the cashier of the First National Bank of Eugene, Oregon, and was such cashier continuously since the 1st of January, 1916, up to the present time.

That I know the above-named defendants V. W. Winchell and F. M. Hathaway, and have known them ever since the 1st day of January, 1916, and for a long time prior thereto; and during all of said times they have been customers of the First National Bank of Eugene, Oregon. That during all of said times, and for a long time prior thereto, the said Winchell & Hathaway had credit at the said bank and were accustomed to borrow money from said bank from time to time in the course of their said

business; and that on the 22d day of April, 1916, the said First National Bank of Eugene, Oregon, loaned to the said V. W. Winchell and F. M. Hathaway the sum of Twenty-eight Hundred Dollars ($2,800.00) and took their promissory note therefor, and said loan was made to said V. W. Winchell and F. M. Hathaway on their credit as individuals and as copartners and not to the Ford Motor Company, a corporation, and not acting on behalf of the Ford Motor Company, a corporation, and [68] that the said First National Bank of Eugene, Oregon, did not loan any sum of money whatever to the Ford Motor Company, a corporation. That the said Winchell and Hathaway paid Three Hundred and Fifty Dollars on said note on the 29th day of May, 1916. That on the 1st day of May, 1916, said bank loaned said Winchell & Hathaway as aforesaid, and upon their credit as individuals and copartners as aforesaid, the further sum of Twenty-eight Hundred Dollars ($2,800.00) and received their promissory note therefor, and that the said Winchell & Hathaway paid Three Hundred and Fifty Dollars on said note on the 5th day of May, 1916, and the further sum of Three Hundred and Fifty Dollars on the 12th day of May, 1916, and the further sum of Three Hundred and Fifty Dollars on the 24th day of May, 1916, and said money was not loaned to the Ford Motor Company or upon its credit. That on the 24th day of May, 1916, the said Winchell & Hathaway in the ordinary course of business borrowed the sum of Eight Thousand Four Hundred Dollars ($8,400.00) from the said First National Bank of Eugene, Oregon, and

gave their promissory note to said bank for said amount and said sum of money was not loaned to the Ford Motor Company or upon its credit and the said bank has never at any time loaned any money to the Ford Motor Company, a corporation, or loaned money to said corporation upon its credit; and the said Ford Motor Company has never borrowed any money from the said First National Bank of Eugene, Oregon, at any time, and the said V. W. Winchell and F. M. Hathaway for more than a year prior hereto, and at the present time, and now, were and are engaged in the automobile business and garage business at Eugene, Oregon, and as copartners, and under the firm name and style of Pacific Auto Company, and have continuously carried on said business, and have credit at the First National Bank of Eugene, Oregon, and in my opinion during all of the time herein mentioned have been and were and are solvent.

LUKE L. GOODRICH.

Subscribed and sworn to before me this 13th day of March, 1918.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921. [69]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Affidavit of F. M. Hathaway, in Support of Motion to Dissolve Restraining Order.

United States of America,
State of Oregon,
County of Lane,—ss.

I, F. M. Hathaway, being first duly sworn, depose and say: That I am the F. M. Hathaway, one of the defendants in the above-entitled suit; that I have read the answer filed herein and that I was present at the trial of the replevin action mentioned and described in said answer, and that the facts alleged in said answer with reference to the proceedings had in said replevin action are true, and that I know of my own knowledge that the facts set forth in regard to the proceedings in said replevin action are true.

That I have never at any time borrowed any money whatever from the First National Bank of Eugene, Oregon, or any other bank for and on behalf of the Ford Motor Company, the plaintiff above named, or acting as the agent of the Ford Motor Company; and that moneys borrowed by myself from the First

National Bank of Eugene, Oregon, were borrowed from said bank on the credit of myself and the credit of V. W. Winchell, and that the said V. W. Winchell and myself were copartners engaged in business in Eugene, Oregon, at the time of borrowing money from said First National Bank of Eugene, Oregon, and executing promissory notes as evidence thereof to said bank, and have been customers of said bank continuously for more than three years last past, and that myself and the said V. W. Winchell as individuals and copartners have for more than three years last past had credit at said First National Bank of Eugene, Oregon, and been accustomed to borrow money from said bank upon [70] our own credit and not otherwise.

And I further say that all of the facts set forth in said answer are true; and I further say that neither myself nor the said V. W. Winchell have ever at any time converted to our own use any money belonging to the Ford Motor Company either in the sum of Twelve Thousand Six Hundred Seventy-six and 38/100 Dollars, or other sum; and that for more than a year last past I have been continuously engaged in the automobile and garage business at Eugene, Oregon, with V. W. Winchell as a copartner, and carrying on said business as a going concern under the firm name and style of Pacific Auto Company; and that both myself and the said V. W. Winchell as individuals and copartners are entirely solvent, and in our said business are able to and *to* pay our outstanding accounts and expenses in the usual course of business. That there are no judg-

ments, proceedings or attachments against either of us either as individuals or copartners, and that each of us own property in our own individual names and the same *in* unincumbered and at the time of the commencement of this suit we were so engaged in business at Eugene, Oregon, carrying on our said business in the usual course as a solvent, going business, as the plaintiff well knew at the time of the commencement of this suit and the filing of its bill of complaint herein.

F. M. HATHAWAY.

Subscribed and sworn to before me this 13th day of March, 1918.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921. [71]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Copartners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Affidavit of V. W. Winchell, in Support of Motion to Dissolve Restraining Order.

United States of America,
State of Oregon,
County of Lane,—ss.

I, V. W. Winchell, being first duly sworn, depose and say: That I am the V. W. Winchell, one of the defendants in the above-entitled suit; that I have read the answer filed herein and that I was present at the trial of the replevin action mentioned and described in said answer, and that the facts alleged in said answer with reference to the proceedings had in said replevin action are true, and that I know of my own knowledge that the facts set forth in regard to the proceedings in said replevin action are true.

That I have never at any time borrowed any money whatever from the First National Bank of Eugene, Oregon, or any other bank for and on behalf of the Ford Motor Company, the plaintiff above named, or acting as the agent of the Ford Motor Company; and that moneys borrowed by myself from the First National Bank of Eugene, Oregon, were borrowed from said bank on the credit of myself and the credit of F. M. Hathaway, and that the said F. M. Hathaway and myself were copartners engaged in business in Eugene, Oregon, at the time of borrowing money from said First National Bank of Eugene, Oregon, and executing promissory notes as evidence thereof to said bank, and have been customers of said bank continuously for more than three years last past, and that myself and the said F. M. Hathaway as individuals and copartners have for more than three

years last past had credit at said First National Bank of Eugene, Oregon, and had been accustomed to borrow money from said bank upon [72] our own credit and not otherwise.

And I further say that all of the facts set forth in said answer are true; and I further say that neither myself nor the said F. M. Hathaway have ever at any time converted to our own use any money belonging to the Ford Motor Company either in the sum of Twelve Thousand Six Hundred Seventy-six and 38/100 Dollars, or other sum; and that for more than a year last past I have been continuously engaged in the automobile and garage business at Eugene, Oregon, with F. M. Hathaway as a copartner, and carrying on said business as a going concern, under the firm name and style of Pacific Auto Company; and that both myself and the said F. M. Hathaway as individuals and copartners are entirely solvent and in our said business are able to and do pay our outstanding acounts and expenses in the usual course of business. That there are no judgments, proceedings or attachments against either of us either as individuals or copartners, and that each of us own property in our own individual names and the same is unincumbered and at the time of the commencement of this suit we were so engaged in business at Eugene, Oregon, carrying on our said business in the usual course as a solvent, going business, as the plaintiff well knew at the time of the commencement of this suit and the filing of its bill of complaint herein.

V. W. WINCHELL.

Subscribed and sworn to before me this 13th day of March, 1918.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921. [73]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Affidavit of P. E. Snodgrass, in Support of Motion to Dissolve Restraining Order.

United States of America,
State of Oregon,
County of Lane,—ss.

I, P. E. Snodgrass, being first duly sworn, depose and say: That I am the president of the First National Bank of Eugene, Oregon, and that in April and May, 1916, I was the vice-president of said bank and that as vice-president of said bank, I was one of the active executives of said bank and actively engaged in the banking business in said bank and giving my time to carrying on the business of said bank.

That I know the above-named defendants, V. W. Winchell and F. M. Hathawy, and have known them

ever since the first day of January, 1916, and for a long time prior thereof; and during all of said times they have been customers of the First National Bank of Eugene, Oregon. That during all of said times, and for a long time prior thereto, the said Winchell & Hathaway had credit at the said bank and were accustomed to borrow money from said bank from time to time in the course of their said business; and that on the 22d day of April, 1916, the said First National Bank of Eugene, Oregon, loaned to the said V. W. Winchell and F. M. Hathaway the sum of Twenty-eight Hundred Dollars and took their promissory note therefor, and said loan was made to said V. W. Winchell and F. M. Hathaway on their credit as individuals and as copartners and not to the Ford Motor Company, a corporation, and not acting on behalf of the Ford Motor Company, a corporation, and that the said First National Bank of [74] Eugene, Oregon, did not loan any sum of money whatever to the Ford Motor Company, a corporation. That the said Winchell & Hathaway paid Three Hundred and Fifty Dollars ($350.00) on said note on the 29th day of May, 1916. That on the 1st day of May, 1916, said bank loaned said Winchell & Hathaway, as aforesaid, and upon their credit as individuals and copartners, as aforesaid, the further sum of Twenty-eight Hundred Dollars, and received their promissory note therefor and that the said Winchell & Hathaway paid Three Hundred and Fifty Dollars on said note on the 5th day of May, 1916, and the further sum of Three Hundred and Fifty Dollars on the 12th day of May, 1916, and the

further sum of Three Hundred and Fifty Dollars on the 24th day of May, 1916, and said money was not loaned to the Ford Motor Company or upon its credit. That on the 24th day of May, 1916, the said Winchell & Hathaway, in the ordinary course of business borrowed the sum of Eight Thousand Four Hundred Dollars from the said First National Bank of Eugene, Oregon, and gave their promissory note to said bank for said amount, and said sum of money was not loaned to the Ford Motor Company or upon its credit and the said bank never at any time loaned said money or any money, to the Ford Motor Company, a corporation, or loaned money to said corporation upon its credit; and the said Ford Motor Company has never borrowed any money from the said First National Bank of Eugene, Oregon, at any time, and the said V. W. Winchell and F. M. Hathaway for more than a year prior hereto, and at the present time, and now were and are engaged in the automobile and garage business at Eugene, Oregon, and as copartners and under the firm name and style of Pacific Auto Company, and have continuously carried on said business and have credit at the First National Bank of Eugene, Oregon, and in my opinion during all of the time herein mentioned have been and were and are solvent.

P. E. SNODGRASS.

Subscribed and sworn to before me this 13th day of March, 1918.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921.

[Endorsed]: Filed March 16, 1918. G. H. Marsh.

Service admitted 15 Mar. 1918.

PLATT & PLATT,
Attorneys for Plaintiff. [75]

AND AFTERWARDS, to wit, on Monday, the 25th day of March, 1918, the same being the 19th judicial day of the regular March term of said court —Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proeedings were had in said cause, to wit: [76]

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR CAR COMPANY, a Corporation,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Copartners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY.

Order Granting Motion to Dissolve Order to Show Cause and Denying Application for Temporary Restraining Order.

March 25, 1918.

This cause was heard by the Court upon the order for the defendant herein to show cause why they should not be temporarily restrained and enjoined from issuing or causing to be issued a writ of execu-

tion upon the judgment in that certain cause No. 7163, in favor of the defendants above named and against the plaintiff above named, and upon the motion of the defendants herein to dissolve the order to show cause herein, and was argued by Mr. Hugh Montgomery, of counsel for said plaintiff, and by Mr. Charles A. Hardy and Mr. I. N. Smith of counsel for said defendants, upon consideration whereof,

IT IS ORDERED that the defendants motion to dissolve the order to show cause herein be and the same is hereby allowed and the application of the plaintiff above named for a temporary restraining order be, and the same is hereby denied.

CHAS. E. WOLVERTON,
Judge.

Filed Mar. 25, 1918. G. H. Marsh, Clerk. [77]

AND AFTERWARDS, to wit, on the 2d day of August, 1918, there was duly filed in said court an amended bill of complaint, in words and figures as follows, to wit: [78]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Amended Bill of Complaint.

COMES NOW the plaintiff above named, and leave of Court therefor having been obtained, files this, its amended bill of complaint, and for cause of suit against the defendants complains and alleges as follows:

I.

That during all the time hereinafter mentioned the plaintiff was, and still is, a corporation incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and place of business at Highland Park, Michigan, and has conformed to the laws of the State of Oregon, authorizing foreign corporations to do business within the State of Oregon, and is a citizen and resident of the State of Michigan.

II.

That during all the times hereinafter mentioned, the defendants V. W. Winchell and F. M. Hathaway were copartners doing business under the firm name and style of "Eugene Ford Auto Company" in the city of Eugene, State of Oregon, and were, and still are, citizens of the State of Oregon. [79]

III.

That on or about the 10th day of September, 1915, the plaintiff and defendants entered into a contract known as a "Limited Agency Contract," wherein and whereby the plaintiff appointed the defendants as its limited agents within certain territory in the State of Oregon, for the purpose of negotiating sales of Ford automobiles to users only, which said con-

tract further provided that the same should remain in force and govern all transactions between the parties until July 31st, 1916, upon the condition, however, that either party might be at liberty to terminate and cancel the contract upon written notice by registered mail, at any time, with or without cause, a copy of which is hereby attached, marked Exhibit "A."

IV.

That on or about the 25th day of May, 1916, the plaintiff, acting under and in accordance with the provisions of said contract of agency, terminated said agency contract by letter, duly registered and forwarded to the defendants through the mails of the United States, and was ready, able and willing to perform all the conditions of said cancellation as in said Exhibit "A" required.

V.

That at the time of the cancellation of said contract, said defendants had in their possession thirty-six touring cars and one sedan, which had been consigned by the plaintiff to said defendants under and in accordance with the provisions and upon the conditions set forth in said agency contract.

VI.

That prior to the cancellation of said contract, and on or about the 22d day of April, 1916, the 1st day of May, 1916, and the 24th day of May, 1916, respectively, the said defendants procured from the First National Bank of Eugene, Oregon, the sum of $14,000.00, evidenced by their three several promissory [80] notes, bearing dates the 22d day of

April, 1916, the 1st day of May, 1916, and the 24th day of May, 1916, respectively, the first note being for the sum of $2,800.00, the second note being for the sum of $2,800.00, and the third note being for the sum of $8,400.00, each of which notes was secured by a chattel mortgage executed by the defendants upon the said thirty-six cars and one sedan, referred to in Paragraph V of this amended bill of complaint, which said sums of money were in form so procured from the First National Bank of Eugene, Oregon, by the defendants individually, although in truth and in fact the said defendants, in obtaining said sums of money, and in executing and delivering said notes and said chattel mortgage to secure the payment of the same, were acting as the agents of the plaintiff under and in accordance with the provisions of said contract referred to in Paragraph III of this amended bill of complaint, and said defendants, after procuring said sums of money as the agents of the plaintiff, converted the same to their own use and benefit.

VII.

That subsequent to the termination of said agency contract, as set out in Paragraph IV hereof, the plaintiff on or about the 3d day of June, 1916, began an action of replevin in the District Court of the United States for the District of Oregon against the defendants named as defendants in this case, and others, as defendants to obtain possession of the automobiles mentioned in Paragraph V hereof, and the said automobiles were on or about the 5th day of June, 1916, taken possession of by the United States

Marshal for the District of Oregon, under process, in said replevin proceeding, duly issued, and, thereafter [81] said Marshal turned over and delivered to the plaintiff herein the said automobiles, and said plaintiff thereafter retained the same. Said replevin case subsequently came on for trial in said court before the Judge thereof and a jury, and was tried on the 6th day of September, 1916, and the jury in said cause rendered a verdict that the defendants Winchell and Hathaway were entitled to recover from the plaintiff the value of said automobiles, fixed at $16,077.50, and $6,000.00 damages, and on the 11th day of September, 1916, a judgment was duly entered by said court upon said verdict, and the said sum of $16,077.50 is the same amount as the 85% advanced by said defendants to the plaintiff under and pursuant to the contract referred to in Paragraph III hereof, and said sum of $16,077.50 was included in the amount of the judgment in said case subsequently paid by the plaintiff under the compulsion of an execution, and to avoid a levy on its property located in the City of Portland, Oregon, by the Marshal for the District of Oregon, which payment was made on the 27th day of March, 1918.

VIII.

That on or about the 10th day of June, 1916, the plaintiff paid to the said First National Bank of Eugene, Oregon, the sum of $12,676.38, being the amounts then due on said three promissory notes, and procured from said bank a release of the lien created by the defendants upon said automobiles in the manner hereinbefore set forth in Paragraph VI,

and said plaintiff made such payment to said First National Bank of Eugene, Oregon, of the said sum of $12,676.38 because the said defendants had not made such payment, and by the execution of said chattel mortgage on said automobiles had created a lien thereon, and said defendants, the agents of the plaintiff, received credit on their said notes for the sum of $12,676.38, so paid said The First National Bank of Eugene, Oregon, and have refused to credit the same against said judgment, and still refuse to pay said sum of money, or [82] any part thereof, to the plaintiff herein, although demand has been made therefor, and although the plaintiff paid said sum to the said First National Bank of Eugene, Oregon, and secured a release of the lien imposed upon the said automobiles, which were owned by the plaintiff at the time when said chattel lien was imposed thereon by the defendants, the agents of the plaintiff, and the said defendants have received the double payment of said amount paid by this plaintiff on said notes, and have received and retained the possession of the sum of $12,676.38, which in equity and good conscience belongs to the plaintiff, and the amount of money so paid by the plaintiff to the First National Bank of Eugene, Oregon, constituted a portion of the amount of money to which the defendants were entitled under and by virtue of the terms of the agreement referred to in Paragraph III of this amended bill of complaint upon the cancellation of said contract by the plaintiff, as in Paragraph IV of this amended bill of complaint alleged, and the plaintiff made an offer in writing to pay to the defendants

the particular sums of money to which the defendants were entitled by reason of the cancellation by the plaintiff of the contract set forth in Paragraph III of this amended bill of complaint, which offer the defendants have at all times refused to accept, and which offer the plaintiff was at all times ready, willing and able to carry out, in the manner alleged in Paragraph IV of this amended bill of complaint. That said payment to the said First National Bank of Eugene, Oregon, was made on behalf of plaintiff under the belief that it was necessary to entitle the plaintiff to have returned to it, pursuant to the terms of said agency contract, the automobiles remaining in the hands of the defendants, and that the said defendants were entitled to receive from plaintiff 85% of the list price thereof, and that the said Eugene Bank was entitled, by reason of said promissory notes and said chattel mortgage, to receive $12,676.38 thereof, borrowed from it. That to the extent of $12,676.38 hereinbefore referred to, in the hands of the defendants, by reason of the transactions with the First National Bank of [83] Eugene, hereinbefore set out, the payment of said judgment under the compulsion of an execution as aforesaid, constitutes a double payment to the defendants of the 85% advances, the repayment of which they were entitled to under the terms of said agency contract, referred to in Paragraph III hereof, and which the plaintiff was equitably entitled to have offset against said judgment *pro tanto.*

IX.

That on the 25th day of February, 1918, prior to

the payment of said judgment as hereinbefore alleged, and prior to the time when execution was ordered upon said judgment by the attorneys for Winchell and Hathaway, the judgment creditor, the plaintiff herein filed its complaint in this case, seeking to have offset *pro tanto* against the judgment aforesaid, said sum of $12,676.38, and seeking an injunction against the collection of the entire judgment, and an application was made for an order restraining the collection of said judgment in its entirety pending the determination of the plaintiff's right to have an offset as aforesaid, which temporary restraining order was refused by the Court upon a finding that the defendants were not insolvent as alleged in said original complaint, and by reason of the refusal of the Court to grant said temporary restraining order, the plaintiff was compelled to, and did, pay the entire judgment as aforesaid, notwithstanding the fact that the defendants had received, by reason of the transactions aforesaid with the First National Bank of Eugene, the sum of $12,676.38 of the amount for which judgment was given them as aforesaid.

X.

That by reason of the premises, the plaintiff is entitled to have maintained, as existing obligations of defendants, said promissory notes and chattel mortgage given to said First National Bank of Eugene, Oregon, and plaintiff is entitled to be subrogated to the rights, claims and remedies of said First National Bank of Eugene against the said defendants and to recover of and [84] from the defendants

and each of them the sum of $12,676.38, with interest thereon from the 11th day of September, 1916.

XI.

That this is a controversy between citizens of different states, and involves more than Three Thousand Dollars, exclusive of interest and costs.

XII.

That plaintiff has no plain, speedy or adequate remedy at law, but only in equity.

AND FOR A FURTHER AND SEPARATE CAUSE OF ACTION against the defendants, plaintiff complains and alleges as follows:

I.

That during all the times hereinafter mentioned, the plaintiff was, and still is, a corporation incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and place of business at Highland Park, Michigan, and has conformed to the laws of the State of Oregon authorizing foreign corporations to do business within the State of Oregon, and is a citizen and resident of the State of Michigan.

II.

That during all the times hereinafter mentioned, the defendants V. W. Winchell and F. M. Hathaway were copartners doing business under the firm name and style of "Eugene Ford Auto Company" in the city of Eugene, State of Oregon, and were, and still are, citizens of the State of Oregon.

III.

That on or about the 10th day of September, 1915, the plaintiff and defendants entered into a contract

known as a "Limited Agency Contract," wherein and whereby the plaintiff appointed the defendants as its limited agents within certain territory in [85] the State of Oregon, for the purpose of negotiating sales of Ford automobiles to users only, which said contract further provided that the same should remain in force and govern all transactions between the parties until July 31st, 1916, upon the condition, however, that either party might be at liberty to terminate and cancel the contract upon written notice by registered mail, at any time, with or without cause, a copy of which is hereto attached, marked Exhibit "A."

IV.

That on or about the 25th day of May, 1916, the plaintiff, acting under and in accordance with the provisions of said contract of agency, terminated said agency contract by letter, duly registered and forwarded to the defendants through the mails of the United States, and was ready, able and willing to perform all the conditions of said cancellation as in said Exhibit "A" required.

V.

That at the time of the cancellation of said contract, said defendants had in their possession thirty-six touring cars and one sedan, whic hhad been consigned by the plaintiff to said defendants under and in accordance with the provisions and upon the conditions set forth in said agency contract.

VI.

That prior to the cancellation of said contract, and on or about the 22d day of April, 1916, the 1st day of

May, 1916, and the 24th day of May, 1916, respectively, the said defendants procured from the First National Bank of Eugene, Oregon, the sum of $14,000.00, evidenced by their three several promissory notes, bearing dates the 22d day of April, 1916, the 1st day of May, 1916, and the 24th day of May, 1916, respectively, the first note being for the sum of $2,800.00, the second note being for the sum of $2,800.00, and the third note being for the sum of $8,400.00, each of which notes was secured by a chattel mortgage [86] executed by the defendants upon the said thirty-six cars and one sedan, referred to in Paragraph V of this complaint. That pursuant to the terms of the contract referred to in Paragraph III hereof, the said defendants advanced to the plaintiff 85% of the list price of said automobiles, and thereby became and were entitled to, and had a lien upon, the automobiles to secure the repayment thereof, and thereby, upon receipt of the possession of said automobiles became entitled to and had a special property to the extent of said lien in said automobiles, and the effect and extent of said chattel mortgage was to assign and transfer to the said First National Bank of Eugene, Oregon, said special property in said automobiles, to secure to said bank the repayment to it of the sums borrowed from it as aforesaid, which sums aggregated less than the aggregate of said 85% advances.

VII.

That subsequent to the termination of said agency contract, as set out in Paragraph IV hereof, the plaintiff, on or about the 3d day of June, 1916, began

an action of replevin in the District Court of the United States for the District of Oregon against the defendants named as defendants in this case, and others, as defendants, to obtain possession of the automobiles mentioned in Paragraph V hereof, and the said automobiles were, on or about the 5th day of June, 1916, taken possession of by the United States Marshal for the District of Oregon, under process, in said replevin proceeding, duly issued, and, thereafter said marshal turned over and delivered to the plaintiff herein the said automobiles, and said plaintiff thereafter retained the same. Said replevin case subsequently came on for trial in said court before the Judge thereof and a jury, and was tried on the 6th day of September, 1916, and the jury in said cause rendered a verdict that the defendants Winchell and Hathaway were entitled to recover from the plaintiff the value of said automobiles, fixed at $16,077.50 and $6,000.00 damages, and on the 11th day of [87] September, 1916, a judgment was duly entered by said Court upon said verdict, and the said sum of $16,077.50 is the same amount as the 85% advanced by said defendants to the plaintiff under and pursuant to the contract referred to in Paragraph III hereof, and said sum of $16,077.50 was included in the amount of the judgment in said case subsequently paid by the plaintiff under the compulsion of an execution, and to avoid a levy on its property located in the city of Portland, Oregon, by the marshal for the District of Oregon, which payment was made on the 27th day of March, 1918.

VIII.

That on or about the 10th day of June, 1916, the plaintiff paid to the said First National Bank of Eugene, Oregon, the sum of $12,676.38, being the amounts then due on said three promissory notes, and procured from said bank a release of the lien created by the defendants upon said automobiles in the manner hereinbefore set forth in Paragraph VI, and said plaintiff made such payment to said First National Bank of Eugene, Oregon, of the said sum of $12,676.38 because the said defendants had not made such payment, and by the execution of said chattel mortgage on said automobiles had created a lien thereon. That said payment was made by the plaintiff to said First National Bank of Eugene, in order to relieve and discharge the said automobiles from the mortgage or lien so created by the defendants upon their interest in said automobiles in favor of said First National Bank of Eugene, and said defendants received credit on their said notes for the sum of $12,676.38, so paid the said First National Bank of Eugene, Oregon, and have refused to credit the same against said judgment, and still refuse to pay said sum of money, or any part thereof, to the plaintiff herein, although demand has been made therefor, and although the plaintiff paid said sum to the said First National Bank of Eugene, Oregon, and secured a release of the lien imposed [88] upon the said automobiles, which were owned by the plaintiff at the time when said chattel lien was imposed thereon by the defendants and the said defendants have received the sum of $12,676.38, or the double

payment of said amount paid by this plaintiff on said notes, and have received and retained the possession of the sum of $12,676.38, which in equity and good conscience belongs to the plaintiff, and the amount of money so paid by the plaintiff to the First National Bank of Eugene, Oregon, constitutes a portion of the amount of money to which the defendants were entitled under and by virtue of the terms of the agreement referred to in Paragraph III, upon the cancellation of said contract by the plaintiff, as in Paragraph IV alleged. That plaintiff made said payment to said bank believing that said bank, by reason of said notes and chattel mortgage had acquired and was entitled to hold the lien on, or special property in, said automobiles existing in the defendants by reason of the 85% advances made by them to plaintiff pursuant to said agency contract, and believing that said bank was entitled to the payment thereof as against the defendants, and plaintiff made said payment to said bank, believing that it was bound so to do to relieve said automobiles from said lien for said advances, and to entitle plaintiff to repossess itself of said automobiles as it was in said agency contract provided it might. That to the extent of $12,676.38 hereinbefore referred to, in the hands of the defendants, by reason of the transactions with the First National Bank of Eugene, hereinbefore set out, the payment of said judgment under the compulsion of an execution as aforesaid, constitutes a double payment to the defendants of the 85% advances, the repayment of which they were entitled to under the terms of said agency contract, referred

to in Paragraph III hereof, and which the plaintiff was equitably entitled to have offset against said judgment *pro tanto.* [89]

IX.

That on the 25th day of February, 1918, prior to the payment of said judgment as hereinbefore alleged, and prior to the time when execution was ordered upon said judgment by the attorneys for Winchell and Hathaway, the judgment creditor, the plaintiff herein filed its complaint in this case, seeking to have offset *pro tanto* against the judgment aforesaid, said sum of $12,676.38, and seeking an injunction against the collection of the entire judgment, and an application was made for an order restraining the collection of said judgment in its entirety pending the determination of the plaintiff's right to have an offset as aforesaid, which temporary restraining order was refused by the Court upon a finding that the defendants were not insolvent as alleged in said original complaint, and by reason of the refusal of the Court to grant said temporary restraining order, the plaintiff was compelled to, and did, pay the entire judgment as aforesaid, notwithstanding the fact that the defendants had received, by reason of the transactions aforesaid with the First National Bank of Eugene, the sum of $12,676.38 of the amount for which judgment was given them as aforesaid.

X.

That by reason of the premises, the plaintiff is entitled to have maintained, as existing obligations of defendants, said promissory notes and chattel mort-

gage given to said First National Bank of Eugene, Oregon, and plaintiff is entitled to be subrogated to the rights, claims and remedies of said First National Bank of Eugene against the said defendants, and to recover of and from the defendants and each of them the sum of $12,676.38, with interest thereon from September 11th, 1916.

XI.

That this is a controversy between citizens of different States, and involves more than $3000.00, exclusive of interest and costs. [90]

XII.

That plaintiff has no plain, speedy or adequate remedy at law, but only in equity.

WHEREFORE, plaintiff prays:

1. For a decree and judgment that it be subrogated to all the rights, claims, demands and remedies of the said First National Bank of Eugene against the defendants, and that plaintiff have judgment and decree against said defendants, and against each of them for the sum of $12,676.38 with interest thereon from the 11th day of September, 1916.

2. That this Honorable Court may grant unto the plaintiff a writ of subpoena of the United States, directed to the defendants V. W. Winchell and F. M. Hathaway, therein and thereby commanding said defendants, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer all and singular the matters and things aforesaid, and to stand and abide by, and sustain such direction and

decree as shall be made herein as to this Court may seem equitable and just.

3. For such other and further relief as to the Court may seem equitable and proper.

PLATT & PLATT,
Solicitors for Plaintiff.

HARRISON G. PLATT,
Of Counsel. [91]

State of Oregon,
County of Multnomah,—ss.

I, Alva W. Jones, being first duly sworn, depose and say that I am the Manager of the Portland Branch of the Ford Motor Company, the plaintiff in the above-entitled suit; and that the foregoing amended complaint is true as I verily believe.

ALVA W. JONES.

Subscribed and sworn to before me this 20 day of July, 1918.

[Seal] C. G. BUCKINGHAM,
Notary Public in and for the State of Oregon.
My commission expires 6/23/20.

Due service of the within amended complaint by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 31st day of July, 1918.

CHARLES A. HARDY,
Of Attorneys for Defendants.

U. S. District Court. Filed Aug. 2, 1918. G. H. Marsh, Clerk. [92]

AND AFTERWARDS, to wit, on the 13th day of September, 1918, there was duly filed in said court a motion to strike amended bill of complaint from the files, in words and figures as follows, to wit: [93]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Motion to Strike Amended Bill of Complaint from the Files and for Judgment Dismissing the Cause.

Come now the defendants above named and move the Court that the amended bill of complaint filed herein be stricken from the files, and that a judgment dismissing this cause be entered upon the following grounds and for the following reasons:

I.

That there has been filed heretofore in this cause and is of record in this case the printed transcript on writ of error in the law action of the Ford Motor Company, the plaintiff above named, against V. W. Winchell and F. M. Hathaway and others heretofore determined in this cause, and which said action was

commenced in this court by this plaintiff on the 27th day of May, 1916, and is referred to in the amended bill of complaint, and that said transcript of error was heretofore filed in this cause on motion for a temporary injunction herein; and for the purpose of this motion, this Court is respectfully asked to take judicial notice and knowledge of the written record and files of this cause, including the original bill of complaint, and the transcript on writ of error in the said law action, between the parties hereto.

The defendants move to dismiss and to strike the amended bill of complaint from the files and for judgment dismissing this cause for the following reasons: [94]

(1) By the said law action, which was affirmed by the Circuit Court of Appeals of the United States for the Ninth Judicial District, these defendants were adjudged to be the owners of the automobiles involved in that case and referred to in the alleged limited agency contract, a copy of which contract is attached to the amended bill of complaint herein;

(2) By verdict in the law action and the said judgment which was affirmed by the United States Circuit Court of Appeals these defendants were adjudged to be the owners of said property at the time the said law action was instituted.

II.

That the said automobiles so owned by defendants are the same automobiles referred to in plaintiff's amended bill of complaint herein, as shown by the records and files in said action.

III.

That by reason of the ownership of such automobiles by the said defendants, the said defendants mortgaged them to the First National Bank of Eugene, Oregon, and said mortgage was made by these defendants individually and is the mortgage referred to in Paragraph 6 of the amended bill of complaint herein; and that the allegations in said paragraph 6 of the said amended bill of complaint from lines 11 to 18 inclusive thereof, are shown to be untrue by the records in this case.

That neither the alleged agency contract nor any relation shows that these defendants made this mortgage as the agent of the plaintiff and that there is no provision in the said alleged agency contract authorizing these defendants to mortgage any property belonging to plaintiff for plaintiff.

That in mortgaging said property for their own benefit these defendants acted within their rights, and that *the* did not convert the money of the plaintiff, or any of plaintiff's money to their own use.

That said paragraph 6 of said amended bill of complaint wherein it charges the facts and things set forth at lines 11 to 18 [95] thereof is false and untrue and stultifies the record as herein shown.

That in the said replevin action, as shown by the printed transcript on writ of error therein, these defendants filed counterclaims, and the plaintiff did not plead the assignment of the alleged mortgage described in Paragraph 6 of the amended bill of complaint to the plaintiff, nor did it assert its alleged right or any claim of right to equitable subrogation,

nor did the plaintiff claim that these defendants had mortgaged their property, nor did the plaintiff set forth any claim of right or recovery by reason of the payment of the mortgage to the First National Bank of Eugene, Oregon, by plaintiff.

That this amended complaint and the entire record in this cause shows that the plaintiff in making the payment of the mortgage to the First National Bank of Eugene, Oregon, acted solely as a volunteer, and not otherwise, and did not make such payment at the request of these defendants, or either of them, or under any liability, either in law or equity of plaintiff on the indebtedness secured by said mortgage.

The record on appeal in said law action fails to show any assignment or error argued on such appeal for failure of the trial court to offset the amount paid by plaintiff on such mortgage, against the judgment awarded these defendants.

By motion for nonsuit, as shown by said transcript in the said law action, as well as by motion for directed verdict, and by the ruling of the Court on the motion made by plaintiff to grant a new trial or to modify the judgment rendered therein in favor of the defendants to offset the sum paid by plaintiff to the First National Bank of Eugene, Oregon, as a counterclaim or offset against the judgment of defendants, the United States District Court for the District of Oregon, adjudged and decided that the plaintiff is not entitled to offset or recover such amount so paid by plaintiff to the First National Bank of Eugene, Oregon; and also that the plaintiff was not entitled to be subrogated in the place [96]

of the mortgagee; and also that the plaintiff had no right in the premises.

On the said appeal of said law action, the plaintiff did not assign any of such rulings as error, and the questions involved in this suit and set forth in the amended bill of complaint herein, and asserted by reason of the pretended facts alleged in said bill of complaint and particularly in Paragraph 6 of said amended bill of complaint, and the following paragraphs of said amended bill of complaint, have all been finally determined, decided and adjudicated adversely to the plaintiff herein.

IV.

That the replevin cause referred to in Paragraph 7 of the amended bill of complaint herein and the various steps taken therein in said suit, and all of the proceedings had at the trial of said cause are all before the Court in this case and the record heretofore presented; and this Court is requested to take judicial notice and knowledge and these defendants here and now make profert thereof and demand oyer thereof.

These defendants move to strike the amended bill of complaint and for judgment of dismissal in this cause for the further ground that said paragraph 7 of the amended bill of complaint herein shows that after the affirmance of said judgment, the plaintiff paid the same under process of this Court, and that in this cause, this plaintiff sought an injunction to restrain the enforcement of such judgment and to prevent the defendants from collecting the said judgment for all the reasons now urged in the amended

bill of complaint, and that this Court refused the said injunction and no appeal was taken therefrom.

That the question of whether the said injunction should issue involves the merits of this controversy, and while the order thereon was interlocutory in form, it was final in fact, and by reason of no appeal being taken therefrom, the matter set forth in the amended bill of complaint and asserted by reason of the pretended fact alleged in Paragraph 7 have been finally determined in favor of these defendants. [97]

V.

These defendants further move to strike the amended bill of complaint from the files herein, and for a judgment of dismissal upon the ground that the matters and things set forth in Paragraph 8 of said amended bill of complaint have been adjudicated adversely to plaintiffs, and that by the proceedings in the law action, it was determined and adjudicated that the plaintiff made the payment to the First National Bank of Eugene, Oregon, voluntarily and without necessity in law or equity therefor and without any request or authority, directly or impliedly, of these defendants, or either of them, to make such payment, and that no relation existed between the plaintiff and these defendants, or either of them, which required the plaintiff to make such payment, and that these defendants were at the time of such payment the owners of said automobiles; and upon the further ground that the facts set forth in said paragraph show that the plaintiff made such payment without any request or authority from the defendants, and without any legal or equitable neces-

sity or right so to do, and that the plaintiff is not entitled to ask subrogation herein.

VI.

The defendants move to strike this amended bill of complaint and for judgment of dismissal in this cause upon the further ground that Paragraph 9 of the said amended bill of complaint affirmatively shows that in this court and cause the plaintiff sought to restrain the enforcement of the judgment recovered by the defendants as to the amount of the payment which plaintiff made to the First National Bank of Eugene, Oregon.

VII.

The defendants further move to strike the amended bill of complaint from the files herein and for judgment of dismissal based upon the record in this cause together with the record in said replevin action between these parties upon the following grounds:

(a) That said records show that the plaintiff does not come into court with clean hands, and that the plaintiff has committed inequity in relation to the automobiles involved, and wilfully [98] and unlawfully trespassed upon the rights of the defendants in relation thereto, and while guilty of such trespass and inequity, the plaintiff voluntarily paid the mortgage which the said defendants placed upon the said automobiles, and did not ask for or receive any assignment of said mortgage, nor did the plaintiff profess to make such payment by reason of the alleged fact or claim that these defendants were the agents of plaintiff in making such mortgage, and that

the pretense now set forth in the amended bill of complaint herein, that these defendants were the agents of plaintiff in making such mortgage, and executed such mortgage as said agents, is untrue and is a sham and an attempted fraud upon this court, and is inserted by the plaintiff maliciously for the purpose of continously harassing these defendants with vexatious and groundless litigation in respect to matters already determined and settled by the courts of the United States in favor of these defendants, and this suit is filed, and the charges of embezzlement and conversion of plaintiff's money inserted in the bill of complaint against these defendants without justification or excuse, and solely for the purpose of annoying these defendants and defaming and injuring their reputation and business standing, and that the said amended bill of complaint does not state any equity in favor of the plaintiff and against these defendants, or either of them, or any cause of suit against these defendants, or either of them.

CHARLES A. HARDY, of Eugene, Oregon.
ISHAM N. SMITH, of Wallace, Idaho,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 13, 1918. G. H. Marsh.
[99]

AND AFTERWARDS, to wit, on Monday, the 30th day of September, 1918, the same being the 79th judicial day of the regular July term of said court,—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [100]

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY

vs.

V. W. WINCHELL et al.

Order Overruling Motion to Strike Amended Bill of Complaint and to Dismiss, etc.

September 30, 1918.

Now, at this day, this cause comes on to be heard by the Court upon the motion of the defendants above named to strike the amended bill of complaint from the files, and to dismiss, the plaintiff appearing by Mr. Hugh Montgomery, of counsel, and defendants appearing by Mr. Charles A. Hardy and Mr. I. N. Smith of counsel. And the Court having heard the arguments of counsel and being fully advised in the premises, IT IS ORDERED that said motion be and the same is hereby overruled.

And thereupon upon motion of said defendants, IT IS FURTHER ORDERED that they be and they are

hereby allowed ninety days from this date within which to file *their herein.* [101]

AND AFTERWARDS, to wit, on the 24th day of January, 1919, there was duly filed in said court, an answer to the amended bill of complaint, in words and figures as follows, to wit: [102]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased; and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL & F. M. HATHAWAY, Copartners Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY.
Defendants.

Answer to Amended Bill of Complaint.

Comes now the above-named defendants and for their answer to the amended bill of complaint admit, deny and allege as follows:

Admit that at the times mentioned in the amended bill of complaint, the plaintiff was still *is a* corporation organized under the laws of the State of Michigan, and has conformed to the laws of the State of Oregon,

authorizing foreign corporations to do business herein; and is a citizen and resident of the State of Michigan.

Admit that during the times mentioned in the amended bill of complaint V. W. Winchell and F. M. Hathaway were copartners doing business under the firm name and style of Eugene Ford Auto Company, in the city of Eugene, State of Oregon, and were citizens of the State of Oregon.

Admit that on or about the 10th day of September, 1915, the plaintiff and said Winchell and Hathaway entered into a contract, but deny that said contract provided that plaintiff appointed said Winchell & Hathaway or either of them as its limited agents for the purpose of negotiating the sale of Ford automobiles to [103] users only, or otherwise than as hereinafter alleged or that said contract further provided that the same should remain in force or govern all or any transactions between the parties until July 31, 1916, or any time, or otherwise or at all, than as hereinafter alleged; or upon the condition that either party might be at liberty to terminate or cancel such contract upon written, or any notice, by registered mail or otherwise, or at any time, or with or without cause or otherwise, or at all, except as hereinafter alleged.

Denies that on or about the 25th day of May, 1916, or at any time the plaintiff, acting under or in accordance with the provisions of said or any contract or agency terminated said, or any, agency contract by letter, or otherwise, duly registered or forwarded to the defendants through the mails of the United

States, or otherwise, or at all, except as hereinafter alleged; or was ready, able or willing to perform all or any of the conditions of said, or any, cancellation as in said or any contract required, or otherwise, or at all, except as hereinafter alleged.

Denies that at the time of the alleged cancellation of said or any contract, or at any time, said Winchell or Hathaway, or either of them, had in their possession thirty-six, or any touring cars or one sedan which had been consigned by the plaintiff to the said defendants, or either of them, under or in accordance with the provisions or any provisions, or upon the conditions or any conditions, set forth in the said or any agency contract, or otherwise, or at all, except as hereinafter alleged.

Denies that prior to the cancellation of said or any contract, or on or about the 22d day of April, 1916, or the 1st day of May, 1916, or the 24th day of May, 1916, or at any time, the said Winchell & Hathaway or either of them procured from the First National Bank of Eugene, Oregon, or elsewhere, the sum of Fourteen Thousand Dollars, or any sum, evidenced by three several promissory notes or otherwise, or bearing date the 22d day of April, 1916, or the 2d day of May, 1916, or the 24th day of [104] May, 1916, or any other date, or the first, or any, note being for the sum of $2,800.00, or any other sum, or the second note being for the sum of $2,800.00, or any sum; or the third note being for the sum of $8,400.00 or any other sum, or otherwise or at all, except as hereinafter alleged; or that each of which or any notes was secured by a chattel, or any, mortgage, executed by the said

Winchell & Hathaway, or either of them, upon the said or any 36 cars, or one sedan, referred to in Paragraph 5 of the Amended Bill of Complaint, or otherwise, or at all, except as hereinafter alleged, or which said sums of money, or any sums of money, were in form, so procured from the First National Bank of Eugene, Oregon, by Winchell or Hathaway, individually or otherwise, or at all, except as hereinafter alleged; or that in truth or in fact the said Winchell or Hathaway, or either of them, in obtaining said, or any sums of money, or in executing said or any notes, or said, or any, chattel mortgage to secure payment of the same, or otherwise, were acting as agents of the plaintiff, or under or in accordance with the provisions of said, or any, contract referred to in Paragraph 3 of the Amended Bill of Complaint, or otherwise, or that said defendants, or said Winchell or Hathaway, or either of them, after procuring said or any sums of money as the agents of the plaintiff converted the same to their own use or benefit, or otherwise, or at all, except as alleged hereinafter.

Denies that subsequent to the termination of said, or any agency contract, as set forth in Paragraph 4 or otherwise, the plaintiff began an action of replevin in the District Court of the United States for the District of Oregon, against the defendants, or either of them, named as defendants in this case, to obtain possession of the, or any, automobiles mentioned in Paragraph 5 of the Amended Bill of Complaint, or otherwise, or at all, except as hereinafter alleged; or that the said or any automobiles were on or about the 5th day of June, 1916, or at any time, taken posses-

sion of by the United States Marshal for the District of Oregon, under process in said, or any, replevin proceedings, duly issued, or otherwise than as hereinafter alleged; or that thereafter said or any [105] marshal turned over or delivered to the plaintiff herein the said, or any, automobiles, or that the plaintiff thereafter, or at any time, retained the same, or otherwise, or at all, except as hereinafter alleged. Denies said or any replevin cases subsequently came on for trial in said or any court, before the Judge thereof, or a jury, or was tried on the 6th day of September, 1916, or at any time, except as hereinafter alleged, or that the jury in said or any cause, returned a verdict that the defendants Winchell or Hathaway were entitled to recover from the plaintiff the value of said, or any, automobiles, and fixed at $16,077.50, or any other sum, or $6,000.00 damages, or on the 11th day of September, 1916, or any other time, a judgment was duly entered by said, or any Court, upon said or any verdict, except as hereinafter alleged; or that the said, or any, sum of $16,077.50, is the same amount as 85% *per cent,* or any per cent advanced by the said, or any defendants, to the plaintiff, or any other person, or under or pursuant to the, or any, contract referred to in Paragraph 3 of the amended bill of complaint, or elsewhere, or otherwise, except as hereinafter alleged; or that the said sum of $16,077.50, or any sum, was included in the amount of the judgment, or any judgment in said, or any, case, subsequently or otherwise paid by the plaintiff under the compulsion of an execution, or to avoid a levy on its property located in the city of Portland, Oregon, or elsewhere, by the

Marshal for the District of Oregon, or any other person, which payment, or any payment, was made on the 27th day of March, 1918, or at any time, or otherwise, or at all, except as hereinafter alleged.

Denies on or about the 10th day of June, 1916, or at any time, the plaintiff paid to the First National Bank of Eugene, Oregon, or any other person, the sum of $12,676.38, or any other sum, or being the amounts, or any amount, then due on said three, or any, promissory notes, or otherwise, or at all, except as hereinafter alleged; or procured from said, or any, bank, a release of the, or any, lien created by the defendants, or either of them, or Winchell or Hathaway, upon the said, or any, automobiles in the [106] manner set forth in Paragraph 6 in the amended bill of complaint, or otherwise, or that the plaintiff made such, or any, payment to the said First National Bank of Eugene, Oregon, or any other person, of the sum of $12,676.38, or any other sum, because the defendants, or either of them, or Winchell or Hathaway, had not made such, or any payment, or otherwise or at all, except as hereinafter alleged, or that by the execution of said, or any, chattel mortgage on said, or any, automobiles the defendants, or either of them, or said Winchell or Hathaway, had created a lien thereon or otherwise, except as hereinafter alleged; or that the said defendants, or either of them, or Winchell or Hathaway, as agents of the plaintiff, or otherwise, received credit on their said, or any, notes, for the sum of $12,676.38, or any other sum, so or otherwise paid the First National Bank of Eugene, Oregon, or any other person, except as hereinafter alleged, or have refused to credit

the same, or any other sum, against said, or any, judgment, or still, or at all, refuse to pay the same, or any sum of money, or any part thereof, to the plaintiff herein, or any other person, except as hereinafter alleged, or that demand has been made therefor, or otherwise, except as hereinafter alleged, or that the plaintiff has paid said, or any, sum, to the First National Bank of Eugene, Oregon, or any other person, except as hereinafter alleged, or secured a release of the, or any, lien imposed upon the said, or any, automobiles, which were owned by the plaintiffs, or any other person, at the time, or any time, when said, or any, chattel lien was imposed thereon by the defendants, or either of them, or Winchell or Hathaway, or either of them, as the agents of the plaintiff, or otherwise, or that the said defendants, or either of them, or Winchell or Hathaway, have received double, or any payment of said, or any, amount paid by this plaintiff, or any other person, on the said, or any, notes, or otherwise, or at all, except as hereinafter alleged; or have received or retained the possession of the sum of $12,676.38, or any other sum, which in equity or good conscience or otherwise, belongs to the plaintiff, or any other person, or that the amount or any amount of money, so, or otherwise paid by the plaintiff to the First National Bank of [107] Eugene, Oregon, or any other person, constituted a portion, or any portion, of the, or any, sum of money to which the defendants, or either of them, or Winchell or Hathaway, were entitled under or by virtue of the terms of the, or any agreement, referred to in Paragraph 3 of the amended bill of complaint, or elsewhere upon the can-

cellation of said, or any, contract by the plaintiff, or any other person, or as in Paragraph 4 of the amended bill of complaint alleged, or otherwise, or that the plaintiff made an offer in writing, or otherwise, to pay to the defendants, or either of them, or to Winchell or Hathaway, the particular, or any, sums of money to which the defendants or either of them, or Winchell or Hathaway were entitled by reason of the, or any, cancellation by the plaintiffs, or any other persons, of the, or any, contract, set forth in Paragraph 3 of the amended bill of complaint, or elsewhere, or which, or any, offer the defendants, or either of them, or Winchell or Hathaway, have at all, or any times, refused to accept, or which, or any, offer the plaintiff was at all, or any times, ready, willing or able to carry out in the manner alleged in Paragraph 4 of the amended bill of complaint, or elsewhere, or otherwise, or at all, except as hereinafter alleged.

Denies that said or any payment to the First National Bank of Eugene, Oregon, or any other person, was made on behalf of plaintiff or any other person, under the belief that it was necessary, or otherwise, to entitle the plaintiff to have returned to it, pursuant to the terms of said, or any, agency contract, or otherwise, the, or any, automobiles remaining in the hands of the defendants or either of them, or Winchell or Hathaway, or that the defendants, or either of them, or Winchell or Hathaway, were entitled to receive from the plaintiffs 85 per cent, or any per cent of the list, or any, price, thereafter, or otherwise, or at all, or that the said Eugene Bank, or any bank, was entitled by reason of said, or any, promissory notes,

or said chattel mortgage, or any mortgage, to receive $12,676.38, or any amount borrowed from it or otherwise. [108]

Denies that to the extent of $12,676.38, or any sum, hereinbefore referred to, or otherwise, in the hands of the defendants, or either of them, or of Winchell or Hathaway, by reason of the transactions, or otherwise, with the First National Bank of Eugene, Oregon, or any other person, the payment of the said, or any judgment under the compulsion of an execution, or otherwise, constituted a double, or any, payment, to the defendants, or either of them, or Winchell or Hathaway, of the 85 per cent, or any per cent, advanced, or otherwise, or the repayment of which, or any sum, they or either of them, were entitled to under the terms of said, or any, agency contract referred to in Paragraph 3 of the amended bill of complaint, or elsewhere, or which the plaintiff was entitled, equitably or otherwise, to have offset against said judgment *pro tanto,* or otherwise, or at all, except as hereinafter alleged.

Denies that on the 25th day of February, 1918, or at any time prior to the payment of said, or any judgment, or prior to the time, or at any time, when execution was ordered upon said or any judgment by the attorneys for Winchell & Hathaway, or any other person, the judgment creditor, the plaintiff herein, filed its complaint in this case asking to have offset *pro tanto* against the judgment referred to in the amended bill of complaint, or otherwise, said sum of $12,676.38, or any sum, or seeking an injunction against the collection of the entire judgment, or any

judgment, or an application was made for an order restraining the collection of said or any judgment in its entirety, or otherwise, pending the determination of the plaintiff's right to have an offset, as set forth in the amended bill of complaint, or otherwise, except as hereinafter alleged, or which temporary, or any restraining order was refused by the Court upon a finding that the defendants were not insolvent as alleged, in the said original complaint or otherwise, or at all, except as hereinafter alleged, or by reason of the refusal of the Court to grant said or any, temporary restraining order, or otherwise, the plaintiff was compelled to and did pay [109] the entire or any judgment, or that notwithstanding the fact that the defendants, or either of them, or Winchell or Hathaway had received by reason of any transactions with the first National Bank of Eugene, Oregon, or any other person, of any other bank, the sum of $12,676.38, or any amount of the amount, or any amount for which any judgment was given them, as set forth in the amended bill of complaint, or otherwise, or at all, except as hereinafter alleged.

Denies that by reason of the matters set forth in the amended bill of complaint, or otherwise, the plaintiff is entitled to have maintained as existing, or any obligation of the defendants or either of them, or Winchell or Hathaway, said or any promissory notes or chattel mortgages given to the First National Bank of Eugene, Oregon, or any other person, or that plaintiff is entitled to be subrogated to the rights, claims or remedies of the First National Bank of Eugene, Oregon, or any other person against the defendants or

either of them, or against Winchell or Hathaway, or to have or recover, of or from the defendants or either of them, or from Winchell or Hathaway, or either of them, the sum of $12,676.38, or any sum, or with any interest thereon, or on any other sum from the 11th day of September, 1916, or any other time.

Admits that this is a controversy between citizens of different States and involves more than Three Thousand Dollars exclusive of interest and costs.

Denies plaintiff has no plain, speedy or adequate remedy at law, and denies that plaintiff has any remedy in equity.

FURTHER ANSWERING the alleged further and separate cause of action set forth in the amended bill of complaint, defendants admit that the plaintiff was and is a corporation as alleged in the amended bill of complaint in Paragraph 1 of the further and separate cause of action alleged.

Admit that at all the times mentioned in the amended bill of complaint that V. W. Winchell and F. M. Hathaway were copartners doing business under the firm name and style of Eugene Ford [110] Auto Company and citizens of the State of Oregon.

Deny that on or about the 10th day of September, 1915, or at any time the defendants and plaintiff entered into a contract known as a "Limited Agency Contract," or otherwise, except as hereinafter alleged, or that under said contract, the plaintiff appointed the defendants or either of them, or Winchell or Hathaway as its limited agents within certain territory of the State of Oregon, or elsewhere, for the purpose of negotiating sales of Ford automobiles to

users only, or otherwise, except as alleged hereinafter. Deny said or any contract provided further that the same should remain in force or govern all transactions between the plaintiff and the defendants until July 21, 1916, or at any other time upon the, or any condition, that either party might be at liberty to terminate or cancel the contract upon written notice, or any notice, by registered mail or otherwise, at any time, with or without cause, or otherwise or at all, except as hereinafter alleged.

Deny that on or about the 25th day of May, 1916, or at any time, the plaintiff acting under or in accordance with the provisions, or any provisions, of said contract, or any contract, terminated said agency contract, or any contract, by letter duly registered, or otherwise, or forwarded to the defendants, or either of them, or to Winchell or Hathaway through the mails of the United States, or otherwise, or was ready or able or willing to perform at all, or any of the conditions of said, or any, cancellation, as in Exhibit "A" required, or otherwise, or otherwise or at all, except as hereinafter alleged.

Deny that at the time of the cancellation of said contract or any contract, or at any time, the said defendants, or either or them, or Winchell or Hathaway, had in their possession 36 or any touring cars or one, or any, sedan, which had been consigned by the plaintiff to said defendants, or either of them, or to Winchell or Hathaway, under or in accordance with the provisions, or any provisions, or upon the conditions set forth in said, or any [111] agency contract, or otherwise, or at all, except as hereinafter alleged.

Deny that prior to the cancellation of said contract, or any contract, or at any time, or on or about the 22d day of April, 1916, or the 1st day of May, 1916, or the 24th day of May, 1916, or at any time, the said defendants, or either of them, or Winchell or Hathaway, procured from the First National Bank of Eugene, Oregon, or any other person the sum of $14,000.00, or any sum, evidenced by their three several promissory notes, or by any promissory notes, or otherwise, bearing date the 22d day of April, 1916, or the 1st day of May, 1916, or the 24th day of May, 1916, or any other time, or the first or any note being for the sum of $2,800.00, or any sum, or the second, or any note, being for the sum of $2,800.00, or any sum, or the third, or any note, being for the sum of $8,400.00, or any other sum, or each of which, or any notes, was secured by a chattel mortgage, or any mortgage, executed by the defendants, or either of them, or Winchell or Hathaway, upon the said, or any, 36 cars or sedan referred to in the amended bill of complaint, or otherwise, or at all, except as hereinafter alleged.

Deny that pursuant to the terms of the contract, or any contract, referred to in Paragraph 3 of the amended bill of complaint, or otherwise, the said defendants, or either of them or Winchell or Hathaway, advanced to the plaintiff 85 per cent, or any per cent, of the list, or any, price, of said, or any automobiles, or otherwise or at all, except as hereinafter alleged, or thereby or otherwise became or were entitled to or had a lien upon the, or any, automobiles to insure the repayment thereof, or otherwise, or at all, except as hereinafter alleged, or that thereby or upon the re-

ceipt of the possession of the said or any automobiles, or otherwise, became entitled to or had a special or any property to the extent of said or any lien in said automobiles, or in any automobiles or otherwise, or at all, except as hereinafter alleged; or that the effect or extent of said, or any, chattel mortgage was to assign or transfer to the said First National Bank of Eugene, [112] Oregon, or any other person, said or any special property in said or any automobiles, or to secure to said or any bank the repayment to it, or any person, of the, or any, sums borrowed from it, as alleged in the amended bill of complaint, or otherwise, and which or any sums aggregated less than the aggregate of said, or any, 85 per cent, or any other per cent of advances, or otherwise, or at all, except as hereinafter alleged.

Deny that subsequent to the termination of said, or any agency contract, or at any other time set out in Paragraph 4 of the amended bill of complaint, or elsewhere, the plaintiff on or about the 3d day of June, 1916, or at any time, began an action in replevin in the District Court of the United States for the District of Oregon, against the defendants, or either of them, named as defendants in this case, or Winchell or Hathaway, or others as defendants, to obtain possession of the, or any automobiles mentioned in Paragraph 5 of the amended bill of complaint, or elsewhere, or otherwise, or at all, except as hereinafter alleged, or that the said or any automobiles were on or about the 5th day of June, 1916, taken possession of by the United States Marshal for the District of Oregon, or any other person under process or

otherwise, in said or any replevin proceeding duly issued or otherwise; or thereafter said Marshal, or any other person turned over or delivered to the plaintiff herein, the said or any automobiles, or the plaintiff thereafter retained the same or any automobiles, or otherwise or at all, except as hereinafter alleged. Deny said or any replevin case subsequently came on for trial in said or any Court before the Judge thereof, or a jury, or was tried on the 6th day of September, 1916, or the jury in said, or any cause, rendered any verdict that the defendants Winchell or Hathaway or either of them, were entitled to recover from the plaintiff the said or any automobile fixed at value of $16,077.50, or any other sum, or $6,000.00 damages, or any damages, or on the 11th day of September, 1916, or at any time a judgment was duly entered by said or any court upon said, or any verdict, or otherwise or at all, except as hereinafter alleged, or that the said or any sum of [113] $16,077.50 is the same amount, or any amount, as 85 per cent, or any per cent advanced by said defendants, or either of them, or Winchell or Hathaway, to the plaintiff under or pursuant to the contract referred to in Paragraph 3 of the amended bill of complaint herein, or elsewhere, or that the said sum of $16,077.50 or any other sum was included in the amount of the judgment, or any judgment, in said or any case subsequently paid by the plaintiff under the compulsion of an execution or otherwise, or to avoid a levy on its property located in the city of Portland, or elsewhere, by the Marshal of the District of Oregon, or

any other person, which payment or any payment was made on the 27th day of March, 1918, or otherwise or at all, except as hereinafter alleged.

Deny that on or about the 10th day of June, 1916, or any other time, plaintiff paid to the First National Bank of Eugene, Oregon, or any other person, the sum of $16,676.38, or any other sum, being the amounts or any amounts due on said three or any promissory notes, or procured from said bank a release of any lien created by the defendants, or either of them, or by Winchell or Hathaway, upon the said or any automobiles in the manner set forth in Paragraph 5 of the amended bill of complaint, or elsewhere in said complaint, or otherwise, or at all, except as hereinafter alleged. Deny the plaintiff made such or any payment to the said First National Bank of Eugene, Oregon, or any bank of the said sum of $12,676.38, or any other sum, because the said defendants or either of them, or Winchell or Hathaway, had not made such or any payment or by execution of said chattel mortgage, or any mortgage, and on said or any automobiles had created any lien thereon, or otherwise or at all, except as hereinafter alleged. Deny that said or any payment was made by the plaintiff to the said First National Bank of Eugene, Oregon, or any other person, in order to relieve or discharge the said, or any automobiles, from the, or any, mortgage or lien created by the defendants, or either of them or by Winchell or Hathaway, upon their interest, or any interest in said or any automobiles in favor of said First National Bank of Eugene, [114] Oregon, or any other person, or

said defendants, or either of them, or said Winchell or Hathaway received credit on their said, or any notes for the sum of $12,676.38, or any other sum, so paid the said First National Bank of Eugene, Oregon, or any other person, or otherwise or at all, except as hereinafter alleged; or that the defendants or either of them, or Winchell or Hathaway, have refused to credit the same, or any other sum, against the said or any judgment and still refuse to pay said sum of money or any sum of money to the plaintiff herein, or that demand has been made therefor, or otherwise, or at all, except as hereinafter alleged, or that the plaintiff paid said, or any, sum to the First National Bank of Eugene, Oregon, or any other person, or secured the release of the or any, lien imposed upon the, or any, automobiles which were owned by the plaintiff, at the time when said or any chattel lien was imposed thereon by the defendants, or either of the, or said Winchell or Hathaway, or that the said defendants, or either of them, or Winchell or Hathaway, have received the sum of $12,676.38, or any other sum, or the double payment or any payment of said amount, or any amount paid by the plaintiff on said, or any, amounts, or have received or retained possession of the sum of $12,676.38, or any other sum, which in equity or good conscience belongs to the plaintiff, or any other person, or the amount of money so paid by the plaintiff, or any sum of money paid to the First National Bank of Eugene, Oregon, or any other person, constituted a portion of any sum of money to which the defendants, or either of them, or Winchell or Hathaway, were entitled

under or by virtue of the terms of the, or any agreement, referred to in Paragraph 3 or elsewhere upon the cancellation of said, or any contract, made by the plaintiff as in Paragraph 4 alleged or elsewhere. Deny the plaintiff made said or any payment, to said bank or any bank, believing the said bank or any bank by reason of said notes or any notes or chattel mortgage, or otherwise, had acquired or were entitled to hold the lien, or any lien, on or special, or any property in, said or [115] any automobiles existing in the defendants, or either of them, or Winchell or Hathaway, by reason of 85 per cent or any per cent advances made by them to plaintiff pursuant to said, or any agency contract, or believing that the said or any bank was entitled to the payment or any payment thereof as against the defendants or either of them, or as against Winchell or Hathaway, or that plaintiff made said or any payment to said bank, or any other person, believing it was bound so to do to relieve the said, or any automobiles, from said or any lien for said, or any advances, or to entitle plaintiff to repossess itself of said or any automobiles, as it was in said or any agency contract provided it might, or otherwise, or at all, except as hereinafter alleged. Deny that to the extent of $12,676.38, or any other sum in the hands of the defendants, or either of them, or of Winchell or Hathaway, by reason of the transactions, or any transactions, with the First National Bank of Eugene, Oregon, or any other person, in payment of said or any judgment under compulsion of any execution, or otherwise constituted a double or any payment to the defendants, or either of them, or

to Winchell or Hathaway, of the 85 per cent, or any per cent advances, for the repayment of which they, or either of them, were entitled to under the terms of said agency contract, or any contract referred to in Paragraph 3 of the amended bill of complaint or elsewhere, or which plaintiff was equitably or otherwise entitled to have offset against said judgment, or any judgment, *pro tanto,* or at all, or otherwise than as hereinafter alleged.

Deny that on the 25th day of February, 1918, or at any time prior to the payment of said or any judgment, as alleged in the amended bill of complaint, or otherwise, or prior to the time when execution was ordered upon said, or any judgment, by attorneys for Winchell and Hathaway, that the judgment creditor, the plaintiff herein, filed its complaint in this case, or any case, asking to have offset *pro tanto* against the judgment aforesaid, or any judgment, said sum of $12,676.38, or any sum, or seeking an injunction against the collection of the entire judgment, or any [116] judgment, or otherwise or at all, except as hereinafter alleged, deny that an application was made for an order restraining the collection of the said or any judgment in its entirety, or otherwise, pending the determination of the plaintiff's right to have an offset or otherwise, or which temporary restraining order was refused by the Court upon any finding that the defendants, or either of them, were not insolvent, as alleged in said original complaint, or otherwise, or at all, except as hereinafter alleged. Deny by reason of the refusal of the court to grant said or any temporary restraining order that plaintiff

was compelled to, or did, pay the entire or any judgment as set forth in the amended bill of complaint, or otherwise or at all, except as hereinafter alleged. Deny that the defendants or either of them had received by reason of the transactions aforesaid with the First National Bank of Eugene, Oregon, or by reason of any transactions with any bank the sum of $12,676.38, or any other sum of the amount for which any judgment was given them, or either of them, as alleged in the amended bill of complaint or otherwise, or at all, except as hereinafter alleged.

Deny that by reason of the matters alleged in the amended bill of complaint or otherwise, the plaintiff is entitled to have maintained as existing obligations of the defendants, or either of them, or Winchell or Hathaway, said or any promissory notes or chattel mortgage given to the First National Bank of Eugene, Oregon, or any other person, or that the plaintiff is entitled to be subrogated to any rights, claims or demands of the first National Bank of Eugene, Oregon, or any other person against the defendants, or either of them, or against Winchell or Hathaway, or either of them, or to recovery of or from the defendants, or either of them or from said Winchell or Hathaway, the sum of $12,676.38, or any sum, or of any interest thereon, or of any other amount from September 1, 1916, or any other time.

Admit that this is a controversy between citizens of different states and involves more than Three Thousand Dollars, exclusive of interest or costs.

Deny plaintiff has no plain, speedy or adequate

remedy at law, and deny that plaintiff has any remedy in equity. [117]

For a further and separate answer and defense to the amended bill of complaint herein, of the Ford Motor Company, a corporation, plaintiff, filed against these defendants, and now and at all times hereinafter saving and reserving to these defendants all manner of benefit and advantage which can or may be had or taken to the many errors, uncertainties and insufficiencies in said amended bill of complaint contained, for their answer thereto say:

I.

That on the 10th day of September, 1915, and for some time prior thereto V. W. Winchell and F. M. Hathaway were engaged in business at Eugene, Oregon, as copartners in carrying on an automobile business and garage business and automobile repair shop and in selling automobiles, automobile accessories, oils, gasoline, tires and other articles used in connection with automobiles, and the repairs thereof, and were then doing business under the firm name and style of Eugene Ford Auto Company as copartners.

II.

That on or about the 10th day of September, 1915, said Winchell and Hathaway signed a contract with the plaintiff, a copy of which is attached to the amended bill of complaint as Exhibit "A."

III.

That on or about the 25th day of May, 1915, the plaintiff undertook to give a notice to the said Winchell & Hathaway whereby the plaintiff claimed

the right to cancel the contract without complying with any of the provisions of said contract with reference to the cancellation of the same, and the plaintiff did not in fact comply with the provisions of said contract with reference to the cancellation of the same.

IV.

That on the 22d day of April, 1916, and for more than a year prior thereto the said Winchell & Hathaway did their banking business with the First National Bank of Eugene, Oregon, and during all of said times had a credit with said bank, so that [118] they were able to and did borrow various sums of money from said bank on their individual credit from time to time, and were accustomed to and did borrow from said bank on their individual credit during all of said time, and on the 22d day of April, 1916, the said bank held the promissory notes of said Winchell & Hathaway, and said Winchell & Hathway executed and delivered as individuals their certain promissory notes as follows; one note executed by V. W. Winchell and F. M. Hathway as payors in favor of the First National Bank of Eugene, Oregon, as payee, bearing date the 22d day of April, 1916, and being for the principal sum of $2,800.00, and bearing interest at the rate of 8 per cent per annum, and on which the said Winchell & Hathway had paid on the 29th day of May, 1916, the sum of $350.00. That the said V. W. Winchell and F. M. Hathway as individuals and as payors made, executed and delivered to the First National Bank of Eugene, Oregon, one note for the principal sum of $2,800.00, dated the

1st day of May, 1916, bearing 8 per cent interest in favor of the First National Bank of Eugene, Oregon, as payee, and on which note the said Winchell & Hathaway paid on the 5th day of May, 1916, $350.00 and on the 12th day of May, 1916, the further sum of $350.00, and on the 24th day of May, 1916, the further sum of $350.00. That V. W. Winchell and F. M. Hathaway, as individuals and as payors, made, executed and delivered to the First National Bank of Eugene, Oregon, their certain promissory note bearing date May 24, 1916, for the principal sum of $8,400.00, bearing interest at the rate of 8 per cent per annum in favor of the First National Bank of Eugene, Oregon, as payee. That said notes were given said bank in the ordinary course of business from the said Winchell & Hathway and represented money loaned by said bank to the said Winchell & Hathaway upon their individual credit, and not otherwise.

That on the 27th day of May, 1916, in order to secure the payment of said note of $8,400.00, said V. W. Winchell and F. M. Hathaway made, executed and delivered to the First National Bank [119] of Eugene, Oregon, a chattel mortgage covering 24 touring cars, and on or about the 2d day of June, 1916, the said V. W. Winchell and F. M. Hathaway, in order to secure to the First National Bank of Eugene, Oregon, the payment of each of the two other promissory notes hereinbefore described, made, executed and delivered to the said First National Bank, two separate chattel mortgages, each of which covered eight automobiles owned by Winchell &

Hathaway, and at the time the said Winchell & Hathaway made the three chattel mortgages hereinbefore described in favor of said bank, the said Winchell & Hathaway were the exclusive owners of each and all of the automobiles mentioned and described in said chattel mortgages, and said automobiles were fully paid for by said Winchell & Hathaway.

V.

These defendants are informed and believed and on such information and belief allege the fact to be that on or about the 10th day of June, 1916, one Goden, appeared at the First National Bank of Eugene, Oregon, and delivered to said bank the sum of $12,676.38, and requested the said bank to cancel the said notes of the said V. W. Winchell & F. M. Hathaway, and turned over to the said bank the said sum of money and made said request to said bank to cancel said notes without the knowledge or consent of either said V. W. Winchell or F. M. Hathaway, and as a mere volunteer, and not otherwise, and claimed at said time to represent the Ford Motor Company, the plaintiff herein, and the said bank accepted said sum of money and cancelled the said promissory notes and the said payment of said sum of money to said bank and the acceptance thereof by said bank constituted and was a voluntary payment to said bank and made without authority, knowledge or consent of the said V. W. Winchell or F. M. Hathaway. [120]

VI.

That on or about the 27th day of May, 1916, the plaintiff herein commenced an action at law in the

United States District Court for the District of Oregon against the said V. W. Winchell and F. M. Hathaway and others, and in said action the plaintiff in this suit was the plaintiff and the said V. W. Winchell and F. M. Hathaway and others were defendants, and said action was an action of replevin in which the said plaintiff claimed to be the owner of and claimed to be entitled to the exclusive and immediate possession of certain automobiles, and being the automobiles referred to in the amended bill of complaint herein; and the plaintiff herein, and being the plaintiff in said action, caused a writ of replevin to be issued out of said Court in said action, and placed the same in the hands of the United States Marshal for the District of Oregon, and caused the said United States Marshal by virtue of said Writ to seize and take possession of the said automobiles and to deliver the same to the plaintiff therein, and the plaintiff herein retained the same; and after the 10th day of June, 1918, and prior to the trial of said action, the plaintiff herein and being the plaintiff in said action, filed an amended bill of complaint therein, and in which said cause the said V. W. Winchell and F. M. Hathaway were defendants, and a copy of said amended complaint upon which said action was tried, as hereinbefore set forth, is attached hereto, and marked Exhibit "A" and made an integral part hereof; and to said complaint in said action said Winchell & Hathaway filed their answer, a copy of which answer is attached hereto and marked Exhibit "B" and by this reference made a part hereof; and said answer was thereafter amended

by adding allegations showing the diversity of citizenship of the parties to said cause. And to said answer, the plaintiff herein and being the plaintiff in said action on the 28th day of July, 1916, filed its reply, denying the allegations of said answer, and a copy of which reply is attached hereto and marked Exhibit "C" and by this reference made a part hereof; [121] and the said pleadings hereinbefore set forth were filed in the District Court of the United States for the District of Oregon, and constitute and were the pleadings upon which said cause was tried.

That issue was joined in said action at law, as aforesaid, and a trial was had thereon during the month of September, 1916, in the District Court of the United States for the District of Oregon, before the Judge and a jury of said court; and, as a result of said trial, a judgment was duly rendered by said Court in said action against the plaintiff, being the plaintiff in said action and the plaintiff in this suit, and in favor of said Winchell & Hathaway, on the 11th day of September, 1916, and said judgment after giving the title of said cause was in words and figures as follows, to wit:

"Thereupon on motion of said defendants for judgment on the verdict heretofore filed and entered herein,

IT IS CONSIDERED that said defendants V. W. Winchell and F. M. Hathaway, copartners, doing business as the Eugene Ford Auto Company, do have and recover of and from the plaintiff, Ford Motor Car Company, a corporation, the immediate posses-

sion and return of the Ford automobiles described in the complaint and answer herein, and being the following numbered Ford automobiles, to wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 10663345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

AND IT IS FURTHER ORDERED that in case return of said automobiles cannot be had that said defendants V. W. Winchell and F. M. Hathaway, copartners, doing business as the Eugene Ford Auto Company do have and recover of and from the said plaintiff Ford Motor Car Company, a corporation, the sum of $16,077.50, the value of the said automobiles, and [122]

IT IS FURTHER CONSIDERED that said defendants V. W. Winchell and F. M. Hathaway, copartners, doing business as the Eugene Ford Auto Company, have and recover of and from the said plaintiff Ford Motor Car Company, a corporation, damages in the sum of $6,000.00 together with costs and disbursements herein taxed at $68.55.

Whereupon on motion of said plaintiff,

IT IS ORDERED that it be and it is hereby allowed thirty days from this date within which to file a motion to set aside said judgment and for a new trial herein, and in which to submit a bill of exceptions, and

IT IS FURTHER ORDERED that issuance of execution upon the said judgment be stayed until after the termination of the said motion for new trial.

R. S. BEAN,
United States District Judge.

Filed September 11, 1916. G. H. Marsh, Clerk."

VII.

That in said action the plaintiff herein, and being the plaintiff therein, called as a witness P. E. Snodgrass, who was then and there the President of the First National Bank of Eugene, Oregon, being the bank described in the amended bill of complaint herein, and the said P. E. Snodgrass as President of said bank produced the promissory notes hereinbefore mentioned, and described, and which are the identical promissory notes referred to in the amended bill of complaint herein, and which had been given by the said Winchell & Hathaway to the First National Bank of Eugene, Oregon, and said promissory notes were offered in evidence by the plaintiff herein in said action, and were received in evidence in said action with evidence claiming to show that the plaintiff herein and therein had voluntarily paid the amount due on said promissory notes amounting to $12,676.38, to said bank, and said evidence was received and admitted in said action at the trial thereof; and in said action the plaintiff therein and herein claimed that the amount so paid to the said bank, to wit, the said sum of $12,676.38 should be offset against the defenses and counterclaims [123] pleaded by the said Winchell & Hathaway in their said answer in said action; and in said action said Winchell & Hathaway offered evidence, and such evidence was

received to the effect that the said Winchell & Hathaway were the owners of the automobiles described in the pleadings in said cause, and which are the same automobiles referred to in this complaint and in the pleadings herein; and in said action evidence was given and received as to the value of said automobiles, and said Winchell & Hathaway were given and granted a judgment against the plaintiff herein for the return of said automobiles, or the value thereof, and the value thereof was fixed and determined by the judgment in said action to be the sum of $16,077.50; and in said action the said Winchell & Hathaway were given judgment against the plaintiff herein and therein for the further sum of $6,000.00 damages sustained by them on account of the wrongful taking of the said automobiles by the plaintiff therein and herein under said writ of replevin, and in said action it was duly adjudicated and determined by the judgment of said court that the plaintiff in this suit had voluntarily paid to the First National Bank of Eugene, Oregon, and as a mere volunteer only and without the authority, knowledge, consent or request of the said Winchell or Hathaway, the said sum of $12,676.38, and that said payment was made voluntarily and was a voluntary payment on the part of the plaintiff herein and therein, to said bank, and it was adjudicated and determined in said action that the plaintiff therein and herein was not entitled to offset said sum against the defenses and counterclaims pleaded in the answer of said Winchell & Hathaway in said action; and it was further duly adjudicated and determined that the said Winchell & Hathaway were the owners of and had the exclu-

sive right to the possession of the said automobiles and to the return thereof, and that they should have and recover of and from the plaintiff therein the said value of said automobiles together with said damages. [124]

VIII.

That after said judgment was rendered as aforesaid, and to wit: on or about the 8th day of November, 1916, the plaintiff, the Ford Motor Company, being the plaintiff in said action and being the plaintiff in this suit, filed a petition for a new trial or modification of said judgment in the District Court of the United States for the District of Oregon in said action, and a copy of which said petition is attached hereto and marked Exhibit "D" and made a part hereof as though the same were fully set forth herein.

That in the said motion and petition aforesaid, the plaintiff in said action and being the plaintiff in this suit, moved the District Court of the United States for the District of Oregon to offset against said judgment and particularly against the said sum of $16,077.50 awarded said Winchell & Hathaway, as aforesaid, by the judgment of said Court, the said sum of $12,676.38, and being the amount of money claimed to have been paid by the plaintiff herein and therein to the said First National Bank of Eugene, Oregon, in payment and discharge of the promissory notes referred to in the amended bill of complaint herein, and given to said bank by the said Winchell & Hathaway. And said motion and petition came on regularly to be heard in the District Court of the

United States for the District of Oregon, and said court on or about the 2d day of January, 1917, duly made and entered an order in said action denying said motion, and thereby and in the proceedings in said action hereinbefore set forth, as aforesaid, it was fully determined, adjudicated and adjudged by the said District Court of the United States for the District of Oregon, in said action wherein the plaintiff herein was the plaintiff therein, and the said Winchell & Hathaway were the defendants therein, that the plaintiff was not entitled to offset said sum of $12,676.38 or any part thereof against the defenses and counterclaims of these defendants in said action and against the said judgment rendered in said District Court of the United States for the District of Oregon in favor of the said Winchell & Hathaway and against this plaintiff, [125] and which is the judgment referred to in the amended bill of complaint herein, and which said judgment and said order denying the modification thereof is the final judgment and order of the District Court of the United States for the District of Oregon, and duly determined said action and said petition and motion.

IX.

These defendants further answering allege that the plaintiff in this suit and the plaintiff in said action of replevin hereinbefore described and referred to in the amended bill of complaint, herein, prosecuted a writ of error from the District Court of the United States for the District of Oregon in said action to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit of the

United States; and said appeal was duly heard and determined by the said United States Circuit Court of Appeals and the said judgment of the said District Court of the United States for the District of Oregon was duly affirmed and the judgment of said Circuit Court of Appeals was duly rendered affirming the said judgment of the District Court of the United States for the District of Oregon in said action, and the opinion of the said Circuit Court of Appeals in said action was duly filed in the District Court of the United States for the District of Oregon on the 1st day of October, 1917, and in said opinion, the said Circuit Court of Appeals and upon the record presented by said writ of error prosecuted by the plaintiff in said action and upon an appeal, determined and decided that the allegation in the amended bill of complaint herein to the effect that the plaintiff in this suit was ready and willing to perform all of the conditions of the alleged cancellation of the said contract referred to in the amended bill of complaint was not true, and in said action of replevin it was claimed by this plaintiff that it had duly and legally cancelled the contract pleaded in its bill of complaint herein as Exhibit "A," and evidence was offered and received by the parties to said action of replevin as aforesaid, on the issues tendered thereon with respect to the alleged cancellation of the contract referred to as Exhibit "A" in the amended bill of [126] complaint herein, and upon said evidence it was duly adjudicated and determined in said action that the plaintiff herein and therein had not complied with the provisions of said contract with

respect requirements therein contained by virtue of which it claimed it was entitled to cancel the said contract, and the said matter was fully adjudicated, determined and adjudged in said action, as shown by the judgment and judgment of the Circuit Court of Appeals in said action, and which said opinion is reported in the Federal Reporter at page 85 of Vol. 245 thereof. And thereafter the said Circuit Court of Appeals duly and regularly issued its mandate in said action, which said mandate has been duly entered of record in the District Court of the United States for the District of Oregon, and the judgment thereon is of record in this said court, to wit: the District Court of the United States for the District of Oregon, and is in full force and effect. And these defendants further allege that in the prosecution of said writ of error and in the assignments of error made by the plaintiff on its said appeal from the said judgment of the District Court of the United States for the District of Oregon to the said Circuit Court of Appeals, the said plaintiff assigned as an alleged ground of error the ruling of the District Court of the United States for the District of Oregon, denying the said motion and petition of the plaintiff for a modification of said judgment by allowing as an offset the said sum of $12,676.38, but did not assign as error the ruling of the Court in the trial of said action wherein and whereby said District Court of the United States for the District of Oregon held that the said payment of the said promissory notes of the said Winchell & Hathaway made by the plaintiff herein and therein to said bank was a voluntary pay-

ment and could not be recovered by this plaintiff from said Winchell & Hathaway. And these defendants allege that by reason of the foregoing matters alleged, as aforesaid, with respect to said adjudications, these defendants plead by reason thereof, and by reason of the premises, as hereinbefore [127] set forth, that all of the matters and things pleaded in the amended bill of complaint in this suit and on account of which this suit is brought are *res adjudicata* and were fully litigated, tried, determined, adjudicated and adjudged in the District Court of the United States for the District of Oregon on the said writ of error from said court to the said Circuit Court of Appeals and in said action as aforesaid, and in a cause wherein the said courts had jurisdiction of the subject matter hereinbefore referred to and the parties to said cause and of said cause.

X.

These defendants further answering allege that the original bill of complaint herein was filed in this court in this suit against the said V. W. Winchell and F. M. Hathaway on the 25th day of February, 1918, and at said time said judgment in said replevin action had not been paid, and had not been satisfied, and the plaintiff herein in said suit alleged the same matters that are alleged in the amended bill of complaint herein, and prayed to have offset *pro tanto* against said judgment the said sum of $12,676.38, and procured a temporary restraining order in this court against the collection of the said judgment in said replevin action, and upon the motion of the said Winchell & Hathaway therein to dissolve said

temporary restraining order, this Court dissolved said temporary restraining order and refused to grant further temporary restraining order or injunction therein. And that on the 27th day of March, 1918, the plaintiff herein paid said judgment and the same was satisfied, and that no execution was levied upon the property of the plaintiff either in Portland, Oregon or elsewhere, but that the plaintiff paid said judgment and did not appeal from the order of the Court dissolving said temporary restraining order or refusing to grant a further temporary restraining order, and said payment was made by the plaintiff to procure the satisfaction [128] of said judgment and the same was duly satisfied thereby, and was and is satisfied of record and on the judgment record of the District Court of the United States for the District of Oregon.

XI.

That prior to the commencement of this suit the said V. W. Winchell and F. M. Hathaway engaged in the automobile business at Eugene, Oregon, and were so engaged in said business for about a year prior to the commencement of this suit under the firm name and style of Pacific Auto Company, and at said time had duly and regularly filed their assumed business name as copartners pursuant to the laws of the State of Oregon in such case made and provided, and that since the commencement of this suit the said V. W. Winchell, who was a defendant herein, had died, and the defendant Fannie S. Winchell as administratrix has been duly appointed the administratrix of the estate of said V. W. Winchell, deceased, by appointment of the County Court of the

State of Oregon for the county of Lane, and the said F. M. Hathaway has been duly appointed as administrator of the partnership estate of V. W. Winchell and F. M. Hathaway, copartners, and that the said Fannie S. Winchell is the duly appointed, qualified and acting administratrix of the estate of said V. W. Winchell, deceased, and the said F. M. Hathaway is the duly appointed, acting and qualified administrator of the partnership estate of V. W. Winchell and F. M. Hathaway, copartners; that the said V. W. Winchell, deceased, was the identical person referred to as a defendant in said replevin action, and his said estate is in the course of administration as aforesaid.

XII.

And that by reason of the premises and all the matters hereinbefore alleged, and the said adjudication of the said courts as hereinbefore set forth, wherein the matters and things upon which this suit is brought, as alleged in the amended bill of complaint, were heretofore brought and finally determined, adjudicated and adjudged by said courts then and there having jurisdiction [129] of the said person and of the said cause of action and of the subject matter of said action, the plaintiff is and should be held to be estopped to deny that both of the alleged causes of suit set forth in the amended bill of complaint herein have been and are *res adjudicata,* and fully determined and adjudicated heretofore and as hereinbefore set forth, and by reason of the premises, the plaintiff ought not to be heard to prosecute or maintain this suit, nor to claim any recovery against

these defendants herein on account of the matters set forth in said amended bill of complaint, and all of which were determined and adjudicated by a court of competent jurisdiction, as aforesaid.

XIII.

These defendants further allege that for more than a year prior to the 10th day of September, 1915, up to the 25th day of May, 1916, during all the time when the plaintiff and said Winchell & Hathaway dealt together with reference to Ford automobiles and including the automobiles referred to in the complaint, the plaintiff dealt with the said Winchell & Hathaway in the sale of automobiles, including the automobiles referred to in the complaint, so that the plaintiff delivered automobiles to said Winchell & Hathaway, and required the said Winchell & Hathaway to pay the plaintiff the full sum required to be paid by said Winchell & Hathaway to the plaintiff for said automobiles, and delivered the same to said Winchell & Hathaway, and the said Winchell & Hathaway paid the said price to the plaintiff and paid the freight thereon and drafts attached to bills of lading for said automobiles for the full amount required to be paid the plaintiff; and upon such payment and delivery, said Winchell & Hathaway received said automobiles and paid the full purchase price of the same, as aforesaid, and received from the plaintiff an invoice of the same marked "paid" by the plaintiff, and upon such payment and delivery said Winchell & Hathaway dealt with the said automobiles as their own [130] with the knowledge and acquiescence of the plaintiff, and no further amount

was required to be paid to the plaintiff, or was in fact ever paid, and the plaintiff gave the said Winchell & Hathaway a receipt in full for payment for said automobiles, and the said contract referred to as Exhibit "A" in the amended bill of complaint between plaintiff and said Winchell & Hathaway ever since the same was made was construed by the parties so that upon the payment of said invoices and sight drafts and the delivery of the automobiles upon the payment of the same and the freight, delivery and title to such automobiles was complete and passed from the plaintiff to said Winchell & Hathaway; and said contract was so construed during all of said times between the plaintiff and said Winchell & Hathaway so that all of the automobiles delivered by the plaintiff to said Winchell & Hathaway, including those mentioned in the amended bill of complaint herein, were purchased from the plaintiff and paid for by said Winchell & Hathaway, and title thereto passed to said Winchell & Hathaway, and said Winchell & Hathaway became and were the exclusive owners of said automobiles and each and every one of the same and no further sums remained to be paid said plaintiff for the said automobiles, or any of them, and the said Winchell & Hathaway claimed to be the exclusive owners thereof with the knowledge, acquiescence and consent of the plaintiff, and dealt with said automobiles as their own. And the foregoing facts were pleaded in the answer of the said Winchell & Hathaway to the replevin action brought by the plaintiff referred to in the amended bill of complaint herein and hereinbefore referred

to, and evidence to support said defense to said action in replevin was offered and received by said Winchell & Hathaway at the trial of said action without objection, and by the judgment hereinbefore set forth in said action, the said issue with reference to the ownership of said automobiles was fully adjudicated and determined, and is *res adjudicata* as between the plaintiffs and these defendants, and the plaintiff ought not to be heard or to claim that the automobiles referred to in the amended bill of complaint were consigned to said Winchell & Hathaway, and ought not to be heard to deny [131] that the said Winchell & Hathaway were the sole and exclusive owners of the same, and had the right to execute the mortgages referred to in the amended bill of complaint and hereinbefore described, and ought not to be heard to say or allege that any claim of subrogation on account of the allegations set forth in the amended bill of complaint herein, and ought not to be heard to say that it had any interest in said automobiles when the same were mortgaged to the First National Bank of Eugene, Oregon, and is and should be held to be estopped to deny that the said Winchell & Hathaway were the sole and exclusive owners of said automobiles when the same were mortgaged by them to the First National Bank of Eugene, Oregon, and are and should be held to be estopped to deny that the plaintiff had no interest in said automobiles at said time, and by reason of the premises, the said issues tendered in the amended bill of complaint herein were heretofore adjudicated fully and *fully* determined by the said District Court of the United States for the District of Oregon in the said action

hereinbefore described in which said action said issue as to the ownership of said automobiles was tendered and tried and determined in said action between the said parties in said court in said proceeding in which the said court had jurisdiction of the parties and the subject matter of said action, and fully and finally determined the same by the final judgment of said court wherein said issues became finally, fully and completely determined and adjudicated, and constitute and are *res adjudicata* between the plaintiff and these defendants.

For a further and separate answer and defense and counterclaim to the amended bill of complaint, these defendants allege:

I.

That V. W. Winchell & F. M. Hathaway mentioned in the amended bill of complaint were copartners doing business under the name and style of Eugene Ford Auto Company at the time they signed the said instrument designated as Exhibit "A" in the amended bill of complaint herein. [132]

II.

That at the time of executing said instrument designated as Exhibit "A" in the amended bill of complaint herein, the said Winchell & Hathaway as such copartners, delivered to the plaintiff the sum of Eight Hundred Dollars, which the plaintiff required said Winchell & Hathaway to deposit with the plaintiff at the time defendant signed said instrument, Exhibit "A"; and the plaintiff in consideration thereof promised and agreed to repay said sum of $800.00 to the said Winchell & Hathaway at the

conclusion of one year from the date of said instrument, the said instrument providing for the delivery of Ford automobiles to the defendants during the period of one year from the date thereof, and by the terms of said agreement for the deposit of said $800.00, with said plaintiff by said Winchell & Hathaway, the same became due and owing from the plaintiff to the said Winchell & Hathaway when the plaintiff repudiated the said instrument and undertook to terminate the same on the 25th day of May, 1916. And these defendants further allege that on said 25th day of May, 1916, the plaintiff herein notified said Winchell & Hathaway that it would be no longer bound by the provisions of said instrument, Exhibit "A," and repudiated the same without complying with any of the conditions set forth therein required by it to be performed to procure a cancellation or termination of the same, and that the plaintiff then and there failed and neglected, and ever since said date has failed, neglected and refused to pay the said Winchell & Hathaway, or these defendants the said sum of $800.00 and thereby there became due and owing from the plaintiff to said Winchell & Hathaway the said sum of $800.00, with interest thereon at the rate of 6 per cent per annum from the 25th day of May, 1916.

III.

That since the commencement of this suit the said V. W. Winchell died, and the defendant F. M. Hathaway was duly appointed administrator of the partnership estate of V. W. Winchell and F. M. Hathaway as copartners, and is the duly appointed,

acting [133] and qualified administrator of said copartnership estate; and the defendant Fannie S. Winchell is the duly appointed administratrix of the estate of said V. W. Winchell, deceased, and both said administratrix and administrator were duly appointed as such by the County Court of Lane County, Oregon, and the plaintiff is indebted to these defendants in said sum of $800.00 with interest at the rate of 6 per cent per annum from the said 25th day of May, 1916, no part of which has been paid.

For a second further and separate answer, defense and counterclaim against the plaintiff, these defendants allege the facts to be:

I.

That between the 10th day of September, 1915, and the 25th day of May, 1916, the said V. W. Winchell and F. M. Hathaway were copartners doing business under the firm name and style of Eugene Ford Auto Company and as Winchell & Hathaway, and as such signed the instrument designated as Exhibit "A" and attached to the amended bill of complaint as such exhibit; and during such time purchased from the plaintiff upwards of 179 Ford automobiles and paid for the same to the plaintiff, and the plaintiff agreed and was bound to pay the said Winchell & Hathaway rebates depending upon the volume of business done between the plaintiff and said Winchell & Hathaway, and on the said 25th day of May, 1916, referred to in said amended bill of complaint, said rebates amounted to the sum of $1,900.60, which said Winchell & Hathaway were entitled to receive from the said plaintiff; and the provision for the

said rebates is fully set forth in said instrument Exhibit "A," attached to plaintiff's amended bill of complaint herein. That the plaintiff failed and neglected to pay the said rebates amounting to the said sum of $1,900.60 or any part thereof, and ever since said 25th day of May, 1916, has failed, neglected and refused to pay the same, or any part thereof, and the same became due and owing from the plaintiff to said Winchell & Hathaway on said 25th day of May, 1916, and no part of the same has been paid. [134]

II.

That the said V. W. Winchell died since the commencement of this suit at Eugene, in Lane County, Oregon, and the defendant F. M. Hathaway was duly appointed administrator of the partnership estate of said Winchell & Hathaway by the County Court of Lane County, Oregon, and is now the duly appointed, acting and qualified administrator of said copartnership estate; and the said defendant Fannie S. Winchell, is the duly appointed, acting and qualified administratrix of the personal estate of said V. W. Winchell, deceased, and that these defendants are entitled to recover the said sum of $1,900.60 (Nineteen Hundred Dollars and Sixty Cents) from the plaintiff with interest thereon from the 25th day of May, 1916.

WHEREFORE, these defendants not confessing or admitting that any matter, cause or thing in said amended bill of complaint contained and not hereby sufficiently answered is true, deny that the plaintiff and complainant is entitled to any relief against

them by reason of any matter in said amended bill of complaint contained, and pray to be hence dismissed with their costs in this behalf sustained; and that they have and recover judgment against the plaintiff for the sum of $800.00 with interest thereon at the rate of six per cent per annum from the 25th day of May, 1916, and the further sum of $1900.60, with interest thereon at the rate of six per cent per annum from the 25th day of May, 1916, together with their costs and disbursements herein to be taxed.

CHARLES A. HARDY,
ISHAM N. SMITH,
Attorneys for Defendants. [135]

Exhibit "A" to Answer to Amended Bill of Complaint.

(Omitting Title.)

AMENDED COMPLAINT.

Plaintiff complains and for cause of action alleges:

I.

That it is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and principal place of business at Highland Park, Michigan, and duly authorized to transact business as a foreign corporation in the State of Oregon, with a factory branch and principal place of business in the State of Oregon in Portland, Multnomah County, Oregon.

II.

That E. A. Farrington and L. A. Houck are copartners doing business under the firm name and style of Pacific Transfer Company, and are engaged

in the warehouse and transfer business at the city of Eugene, Oregon.

III.

That H. Sandgathe is an individual doing business as the Springfield Garage, and is in the automobile business at Springfield, Oregon.

IV.

That V. W. Winchell and F. M. Hathaway are co-partners doing business as the Eugene Ford Auto Company, and are in the automobile business at Eugene, Oregon.

V.

That A. Wilhelm and John Doe Wilhelm are co-partners doing business as A. Wilhelm & Son, and are in the automobile business at Junction City, Oregon.

VI.

That heretofore and on, or about September 10th, 1915, plaintiff and defendants V. W. Winchell and F. M. Hathaway entered into a contract whereby said defendants were to represent the plaintiff as limited agents. Pursuant to said contract plaintiff [136] consigned to the said defendants in this paragraph mentioned the following number Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066343, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1067115 10088770, 1079019, 1079020, 1067411, 1068781, Sedan 658934, 1116486.

VII.

That thereafter plaintiff, pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly canceled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of Thirty-four Hundred and One and 12/100 Dollars ($3401.12) which amount is the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings said sum of Thirty-four Hundred and One and 12/100 Dollars into this court in this action, ready to be paid to defendants.

VIII.

That the amount involved in this action is in excess of three thousand dollars, and within the jurisdiction of this Court.

IX.

That at the time of the commencement of this action said automobiles above described are within the State of Oregon and the jurisdiction of this Court, and in the possession of the defendants herein; and that the plaintiff is the present owner and entitled to the immediate possession of said automobiles; that demand has been made upon the defendants for

the possession of said automobiles and defendants have refused to give plaintiffs possession of said automobiles. [137]

X.

That said automobiles are of the value of Sixteen Thousand Seventy-seven and 50/100 Dollars ($16,077.50).

Wherefore plaintiff demands judgment against the defendants for the recovery of Ford automobiles as particularly set forth in Paragraph VI of this complaint, or for $16,077.50, the value thereof; $1,000.00 damages for the detention thereof; and for the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the plaintiff's attorney in the above-entitled action, and that the foregoing proposed amended answer is true as I verily believe; and that I make this verification because the attorney in fact is without the state and I am acquainted with the facts.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 14th day of August, 1916.

(Sgd.) HOMER T. SHAVER,
Notary Public for Oregon.

My commission expires July 19, 1920.

Filed August 14, 1916. G. H. Marsh, Clerk. [138]

Exhibit "B" to Answer to Amended Bill of Complaint.

(Omitting Title.)

ANSWER.

Comes now the defendants and answering the complaint herein admit the allegations contained in Paragraph I, in Paragraph II, in Paragraph III, in Paragraph IV, and in Paragraph V of the complaint herein.

Deny each and every other allegation contained in said complaint except as hereinafter expressely admitted, and except as hereinafter alleged.

For a further and separate answer and defense to said complaint these defendants allege and V. W. Winchell and F. M. Hathaway prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint and had paid the plaintiff the full purchase price required to be paid from them to plaintiff, and no further payments were to be made thereon; and thereupon, the plaintiff delivered said automobiles to defendants and title to the same passed from plaintiff to defendants, and defendants became the owners thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof, were and are now the owners thereof, and entitled to the immediate and exclusive possession of the said automobiles.

For a further and separate answer and defense to said complaint the defendants V. W. Winchell and F. M. Hathaway reallege all of the allegations con-

tained in the first answer contained herein, and these defendants further allege that ever since the contract mentioned in the complaint was made between plaintiff and these defendants, plaintiff has dealt with these defendants in the sale of automobiles, so that when the defendants paid to plaintiff the amount required to take up the bill of lading sent for collection by the plaintiff with the automobiles delivered by plaintiff to defendants, and paid the freight and draft attached to such bill of lading delivery was made of said automobiles to defendants [139] and such drafts were drawn by plaintiff against defendants for the full sum required to be paid by defendants to plaintiff as the purchase price of said automobiles, and upon such payment and delivery *plaintiffs* have received said automobiles and dealt with the same as their own, with the knowledge and acquiescence of plaintiff; and the contract between plaintiff and defendants ever since the same was made has been construed by the parties, the same being the contract under which plaintiff sold and defendants purchased the said automobiles, so that upon payment of such sight drafts and delivery of the automobiles upon the payment of the same and the freight, title and delivery to such automobiles were completed and passed from plaintiff to defendants and that all of the automobiles mentioned in the complaint were purchased from plaintiff and paid for by defendants upon the terms hereinafter set forth; and long prior to the institution of this action, and not otherwise; and that at the time of the commencement of this action and for a long time prior

thereto defendants were and are the exclusive owners of said automobiles and each one of the same and entitled to the immediate and exclusive possession thereof, and were in the lawful possession thereof at the time of the commencement of this action.

For a third further and separate answer and defense these defendants allege the truth to be: That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plaintiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defendants V. W. Winchell and F. M. Hathaway all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and [140] each and every one thereof.

For a fourth further and separate answer and defense and counterclaim the defendants V. W. Winchell and F. M. Hathaway allege that during all the times mentioned herein they were, and now are, copartners doing business under the firm name and style of Eugene Ford Auto Company, and had duly registered their assumed business name with the County Clerk of Lane County, Oregon, and were engaged in a general automobile business in Lane County, Oregon, and engaged in buying and selling Ford automobiles, parts, fixtures, accessories, sup-

plies and materials used in said business and incident thereto.

That at the time of the commencement of this action these defendants were, and are now, the owners of the Ford automobiles mentioned in the complaint and being automobiles numbered and specifically designated in Paragraph VI of the complaint and being Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062232, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, sedan 658934, 1116486.

That said automobiles were and are of the value of $493.25 for each of said cars, except for the sedan which was and is of the value of $798.25.

That the defendants at the time of the commencement of this action, as such owners of said automobiles, were entitled to the immediate and exclusive possession of the same; and on or about Monday, the 5th day of June, 1916, the plaintiff instituted the above cause and wrongfully and unlawfully and maliciously caused the writ of replevin to be issued out of this court and filed an affidavit and bond thereon and demanded the immediate possession of the said automobiles; and at the said time the plaintiff well knew that said automobiles and each and every one thereof, were the exclusive property of these answering defendants, V. W. Winchell and [141] F. M. Hathaway; and that said defendants were entitled to the immediate and exclusive posses-

sion thereof, and plaintiff caused said writ of replevin to be issued herein and the said automobiles to be seized maliciously, wrongfully and unlawfully for the purpose of destroying the business of these defendants and injuring their financial standing and credit and depriving them of said property of the value of $18,555.25, as aforesaid, and to drive them out of business and to prevent them from conducting their automobile and garage business hereinbefore described.

That at said time these defendants had an established business in dealing in automobile accessories, appurtenances and supplies from which they were then making and had been making for several months last past a regular profit of approximately Three Hundred Dollars per month.

That by the wrongful acts of the plaintiff, as herein alleged, the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited and they have been injured and damaged by the malicious acts of defendants as alleged, to the sum of twenty-five thousand dollars, in addition to the general damages hereinbefore set forth, to wit: Value of the automobiles and the property aggregating $18,555.25.

That the plaintiff is a corporation of great wealth and extensive business associations and power in the commercial world and in committing the acts herein set forth, it has used its wealth, standing and power to harass and annoy these defendants by the issuance of legal process to which plaintiff knew it was not entitled.

WHEREFORE defendants demand judgment that the defendants V. W. Winchell and F. M. Hathaway have judgment against the plaintiffs for the recovery of the Ford automobiles, as particularly set forth in the answer herein, or for $18,555.25, the value thereof; and for Twenty-five Thousand dollars damages; and for their costs and disbursements in this action.

I. N. SMITH,
L. BILYEU and
THOMPSON and HARDY,
Attorneys for Defendants. [142]

State of Oregon,
County of Lane,—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action; and that the foregoing answer is true, as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 13th day of June, 1916.

[Notarial Seal]

HELMUS W. THOMPSON,
Notary Public for the State of Oregon.

My commission expires March 27, 1917.

Filed June 14, 1916. G. H. Marsh. [143]

Exhibit "C" to Answer to Amended Bill of Complaint.

(Omitting Title.)

REPLY.

Comes now the plaintiff, Ford Motor Company, a

corporation, and for reply to the first further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained, which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff replying to the second further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff replying to the third further and separate answer and defense of the defendants denies the same, and the whole thereof, except as to the matters therein contained, which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff replying to the fourth further and separate answer and defense of the defendants, denies the same and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

WHEREFORE, plaintiff having fully replied to the further and separate answers and defenses of the defendants prays judgment as heretofore asked for in the complaint on file herein.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the attorney for plaintiff corporation in the above-entitled action, and that the foregoing reply is true, as I verily believe. I further

state that I have personal knowledge of the facts herein contained, and verify this reply for the reason that the proper officer for service of this corporation is not now within the state.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 28th day of July, 1916.

(Sgd.) F. C. McDOUGAL,
Notary Public for Oregon.

My commission expires July 1, 1920. [144]

Exhibit "D" to Answer to Amended Bill of Complaint.

(Omitting title.)

Comes now the plaintiff in the above-entitled action appearing by Messrs. Platt and Platt and E. L. McDougal, its attorneys of record, and petitions the Court for a new trial in the above-entitled action, and for grounds of such petition alleges:

I.

That it appears from the undisputed testimony introduced upon the trial of the above-entitled cause that the plaintiff was compelled to and did pay to the First National Bank of Eugene, Oregon, three notes of the defendants, V. W. Winchell and F. M. Hathaway, aggregating the sum of $12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above-entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to

maintain an action for the replevin of said automobiles, and the Court failed and refused to instruct the jury at the trial of the above-entitled action that the plaintiff was entitled to offset the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants, and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above-entitled action upon the further ground that the verdict of the jury made and entered in the above-entitled action, and the judgment entered thereon contravenes the instructions given by the Court upon the trial of the above-entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of $16,077.50, and said judgment is contrary to the evidence introduced upon the trial of the above-entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause and the law applicable to the facts proven as evidenced by the instructions of the Court made upon the trial [145] of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above-entitled action and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its rights to the possession of the automobiles in controversy and that no evidence was introduced

upon the trial of the above-entitled cause upon which any claims for damages for the sum of $6,000.00 or any sum in excess of $2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above-entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above-entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above-entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above-entitled cause.

IV.

Plaintiff further petitions the Court for an order modifying the judgment entered in the above-entitled cause on the —— day of September, 1916, by offsetting against the sum of $16,077.50 therein awarded to the defendants in lieu of the machines sought to be replevined in the above-entitled action the sum of $12,676.38, being the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to the First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel

mortgage upon the automobiles sought to be replevined in the above-entitled action, which facts appear from the undisputed [146] evidence introduced upon the trial of the above-entitled cause, and for the grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of $2,800.00 bearing date April 22d, 1916; the second note being in the sum of $2,800.00 bearing date May 1st, 1916, and the third note being in the sum of $8,400.00, bearing date May 24th, 1915, each of which notes was secured by a chattel mortgage upon the property sought to be replevined in the above-entitled action, in order to free the property involved in the above-entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this Court modifying the judgment heretofore entered in the above-entitled cause on the —— day of September, 1916, by striking therefrom the sum of $6,000.00 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above-entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants V. W. Win-

chell and F. M. Hathaway, prior to the institution of the above-entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants V. W. Winchell and F. M. Hathaway, and that no evidence was issued upon the trial of the above-entitled cause upon which any claim or judgment for damages in the sum of $6,000 could properly be based, and that such allowance of $6,000 for damages or any other sum in excess of $2,414.75 is in contravention of the instructions of the Court directing the jury that they should [147] not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendants' contract with the plaintiff in the above-entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff.

Filed 8th day of November, 1916. G. H. Marsh.

State of Oregon,
County of Lane,—ss.

I, F. M. Hathaway being first duly sworn depose

and say that I am one of the defendants in the above-entitled suit; and that I have read the foregoing answer and know the contents thereof, and that the same is true, as I verily believe.

F. M. HATHAWAY.

Subscribed and sworn to before me this 18th day of January, 1919.

[Seal] CHARLES A. HARDY,
Notary Public for Oregon.

My commission expires March 19, 1921.

I hereby accept service of the foregoing answer by the receipt of a copy thereof duly certified as a true and correct copy of the original by Charles A. Hardy of attorneys for the defendants therein.

Dated at Portland, Oregon, this 23d day of January, 1919.

ROBERT TREAT PLATT,
Of Plaintiff's Attorneys.

[Endorsed]: Filed Jan. 24, 1919. G. H. Marsh. [148]

AND AFTERWARDS, to wit, on the 18th day of July, 1919, there was duly filed in said court a reply, in words and figures as follows, to wit: [149]

In the District Court of the United States in and for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

V. W. WINCHELL and F. M. HATHAWAY, Co-partners, Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Reply.

COMES NOW, the plaintiff above named and for its reply to the counterclaims set forth in defendants' second further and separate answer and defense, denies, admits and alleges as follows:

I.

Admits paragraph 1, page 29 of said answer.

II.

Admits that at the time of executing said instrument designated Exhibit "A" in the amended bill of complaint, the said Winchell and Hathaway delivered to the plaintiff $800.00 and denies that plaintiff promised to repay said $800.00 at the conclusion of one year from the date of the contract, and alleges it was agreed between the parties that said $800.00 might be retained by the plaintiff to satisfy legitimate claims against the defendants, and also as

security for the fulfillment of the terms of the contract, and the defendants have not fulfilled the terms of said contract, and the plaintiff denies that it cancelled said contract without complying with its terms and conditions, and denies that there is now due and owing from the plaintiff to the defendants the sum of $800.00 or any sum.

III.

Answering Paragraph III, page 30 of said answer, the plaintiff denies that it is indebted to the defendants in the sum of $800.00, or any other sum, and admits the other [150] allegations contained in said paragraph.

Plaintiff for its reply to defendants' second further and separate answer and defense, and the counterclaim therein contained, denies, admits and alleges as follows:

I.

Plaintiff denies that the defendants purchased upwards of 179 automobiles, and alleges that defendants purchased only 105 automobiles, and denies that the rebates amounted to $1900.60, or any sum greater than $1,338.10, and denies that there is due and owing from the plaintiff to the defendants the sum of $1900.60 or $1338.10, or any other sum or sums, or that the plaintiff has failed and neglected to pay the same.

II.

Answering Paragraph II, page 31 of said answer, plaintiff denies that the defendants are entitled to recover from the plaintiff the sum of $1900.60, or any other sum or sums, and admits the other alle-

gations in said paragraph contained.

WHEREFORE plaintiff prays for a decree as set forth in the prayer of its amended bill of complaint.

PLATT & PLATT,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

[Endorsed]: Filed July 18, 1919. G. H. Marsh.

I, Hugh Montgomery, being first duly sworn, depose and say that I am one of the solicitors for the plaintiff and that the plaintiff is a foreign corporation and its resident manager is not within the state and district of Oregon, and that the allegations of this reply are based upon records and that the foregoing reply is true as I verily believe.

HUGH MONTGOMERY.

Subscribed and sworn to before me this 18th day of July, 1919.

[Seal] C. G. BUCKINGHAM,
Notary Public for Oregon.

My commission expires ——. [151]

AND AFTERWARDS, to wit, on Monday, the 28th day of July, 1919, the same being the 19th Judicial day of the regular July term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [157]

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Decree.

This cause came on to be heard at this term, plaintiff appearing by Mr. Hugh Montgomery, of the firm of Platt & Platt, solicitors of record for the plaintiff, and defendants appearing by Messrs. Charles A. Hardy and I. N. Smith, solicitors of record for the defendants, and after testimony submitted, the cause was argued by counsel, and, thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff recover of and from the defendants, and each of them, and have judgment and decree for the sum of Twelve Thousand Six Hundred Seventy-six Dollars and Thirty-eight Cents ($12,676.38) with legal interest thereon from June 10,

1916, interest amounting, this 28th day of July, 1919, to Two Thousand Three Hundred Eighty-three Dollars and Nine Cents ($2383.09), or a total, principal and interest of Fifteen Thousand Fifty-nine Dollars and Forty-seven Cents ($15,059.47) against which there should be credited the sums of Eight Hundred Dollars ($800) and Thirteen Hundred Thirty-eight Dollars and Ten Cents ($1338.10), amounting to Two Thousand One Hundred Thirty-eight Dollars and Ten Cents ($2138.10), with legal interest thereon from May 25, 1916, interest amounting, this 28th day of July, 1919, to Four Hundred Seven Dollars and [158] Twenty-nine Cents ($407.29), or a total, principal and interest, of Two Thousand Five Hundred Forty-five Dollars and Thirty-nine Cents ($2545.39), leaving the net amount of the judgment and decree herein in favor of plaintiff and against the defendants and each of them, after all setoffs, the sum of Twelve Thousand Five Hundred Fourteen Dollars and Eight Cents ($12,514.08) together with legal interest thereon from July 28, 1919, for which judgment and decree is hereby directed to be docketed, together with plaintiff's costs, hereby taxed and allowed, in the sum of —— ($——), and that execution issue therefor.

R. S. BEAN,
Judge.

Dated at Portland, Oregon, this 28th day of July, 1919.

[Endorsed]: Filed July 28, 1919. G. H. Marsh, Clerk. [159]

AND AFTERWARDS, to wit, on the 4th day of August, 1919, there was duly filed in said court, a petition for rehearing and objections to decree, in words and figures as follows, to wit: [160]

In the District Court of the United States for the District of Oregon.

ORIGINAL.

No. 2932.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Motion for Rehearing and Reargument, Also Objections to Decree.

The defendants F. M. Hathaway and Fannie S. Winchell, as Administratrix, etc., by their solicitors, Charles A. Hardy and I. M. Smith, respectfully move for a rehearing and reargument in the above cause, upon the grounds hereafter set forth and spe-

cify such grounds as their objections to the findings and decree heretofore rendered, to wit:

I.

In the opinion, the Court says:

> "The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein, etc.

The replevin action was tried upon amended pleadings. In Paragraph VII of the amended complaint, which was filed by leave of Court pursuant to application by the Ford Motor Company, which application was as follows:

(Title of Original Cause.)

> "Comes now the plaintiff in the above-entitled action and moves the Court for an order allowing it to [161] amend its complaint on file herein by pleading the tender in paragraph VII of said complaint, copy of the amended complaint desired being attached hereto and made a part of this motion."

the Ford Motor Company made the following allegation:

"VIII.

> "That thereafter plaintiff, pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly cancelled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that de-

fendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of Thirty-four hundred and one and 12/100 dollars ($3401.12), which amount is the defendants', Winchell and Hathaway, advances in said cars at this time and that plaintiff now brings the said sum of Thirty-four hundred and one and 12/100 dollars into this court in this action ready to be paid to defendants."

In support of this allegation the Ford Motor Company offered its proof of the payment to the bank of the sum in dispute, which added to the amount specified in Paragraph VII as tendered into court, made up the entire Sixteen Thousand Dollars, or 85 per cent of the purchase price of the automobiles involved.

We therefore urge that the specific payment to the bank was actually involved in the trial of the replevin case, and that the ruling thereon, holding such payment to be voluntary, was necessarily adjudged in the trial and subsequent proceedings had in that case by motion and on appeal, as shown by the record.

II.

But whether the payment of the sum to the bank was actually litigated or not, it should have been and could have been so litigated in the replevin case.

By the amendment to the Practice Act heretofore quoted, parties litigant are required to set forth in

an action [162] at law of their rights for adjudication, whether such rights be legal or equitable or both. The plaintiff files a complaint and a reply, in either of which any right, either legal or equitable, which relates to, depends upon, arises from or is connected with, the subject matter or the transaction or the contract involved in the action, is necessarily required to be set forth; the defendant may file his answer and is required to set forth all of his rights, both defensive and affirmative, whether legal or equitable, which likewise relate to, are connected with, arise from or depend upon the transaction or contract involved; and if the defendant sets forth an affirmative right in the answer, the plaintiff must reply thereto and must also set forth in the reply such other affirmative matter as the plaintiff may have against the new matter in the answer. To this new matter in the reply of the plaintiff the defendant is required to file a replication.

The procedure, therefore is broader than the reformed procedure adopted in any of the states. In no state under the reformed procedure is there any such provision as that under the United States practice, which permits the defendant to obtain affirmative relief in the replication to the reply.

We therefore urge,

(a) That the question of tender was necessarily involved in the replevin case;

(b) In the absence of the tender before suit, all equities, if any, which would excuse or supplement the tender, or show any right in plaintiff to explain

the absence of such tender, were and necessarily are involved;

(c) Because the plaintiff claims an equity arising out of the payment to the bank, and because it was necessary under the contract for the plaintiff to tender to the defendant the full 85% advanced, it is urged that the replevin case actually involved either the tender or, in its absence, facts excusing the tender, and in either event took all rights, both legal or equitable, relating to the tender or its excuse. [163]

In this connection we believe that the effect of the adoption of the reformed practice in the pleadings by permitting equitable practice to be engrafted upon the law side of the court, is to change the nature of the investigation at law, converting it into an equitable proceeding in all cases, instead of one purely legal, as heretofore. That is to say one of the principal distinctions on matters of procedure between actions and suits is,

In actions the legal rights are determined as of the date the case is instituted; whereas in suits the equitable rights are adjudged as of the date of trial.

At bar the plaintiff alleged the tender in the original complaint, and thereafter, by leave of court, filed an amended pleading to set forth more particularly its basis of tender, and paid into court $3401.12, which, added to the sum of money paid to the bank aggregated $16,037.50 (the amount set forth in paragraph VII of the amended complaint), or the entire

85% of the full purchase price paid for the cars involved.

III.

In addition to the issues framed by the amended complaint and the denials thereof, the defendant affirmatively alleged title and ownership of the cars in them. This necessarily involved the acquisition of title, as the defendants claimed that such title was acquired by full payment for the cars. Upon this question the plaintiff's contract and the plaintiff's right and duty of tender, involving its excuses for nontender and equities arising out of the payment to the bank, were all involved. The defendants asserted that by the payment of the sum which we have spoken of heretofore as 85% of the purchase price, the title passed to them. [164]

At the trial of the replevin case they contended, and still assert, that the following facts determine their rights as owners of the cars:

(a) The sum paid the Ford Motor Company, though termed an 85% payment, was and is a payment in full to that company of its entire interest in the cars.

(b) The remaining 15% of the retail sale price was the property of the defendants and not the plaintiff.

(c) By the course of business, the giving of receipts, the making and payment of sight drafts, etc., the parties placed a practical construction on their mutual dealings, which showed that they treated the 85% payment as an extinction of this plaintiff's rights, and that the Ford Company executed and delivered receipts in full, which were in evidence.

(d) The verdict awarded to these defendants the cars or their value, together with damages for the wrongful taking and detention.

Now, by Paragraph VII of the amended complaint the Ford Company pleaded either a legal or equitable tender of the entire $16,077.50. The Court ruled as heretofore shown, and because the question was submitted to the Court for determination, the Ford Motor Company should have reviewed it upon appeal. The Court certainly had power to rule upon the admissibility of the evidence to prove the issue tendered; that ruling was either right or wrong, but whether right or wrong, it was necessarily involved as part of the old trial, and the position of the Court in excluding the evidence because the payment was voluntary, became and is, *res adjudicata* in absence of reversal.

We therefore urge that the question of tender or excuse for tender or equities arising out of either tender or its excuse as well as the question of title, were necessarily involved in the replevin case. In the opinion the Court says:

> "The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein," etc.

But with the pleadings and this record in the condition [165] above shown, the defendants respectfully urge that the matter was placed in issue by the amended complaint at Paragraph VII, and the denial thereof, and was again placed in issue by the claim of ownership and right to possession in the answer,

and that upon the original trial the question of whether this payment was voluntary or otherwise was directly involved.

While this cleancut theory of the Court would formerly apply in all cases so long as the distinction between legal and equitable rights was strictly observed, and so long as a court at law had no power to give equitable relief, yet we urge that under the reformed procedure all rights, whether legal or equitable or both which arise out of, relate to, depend upon or are connected with a given controversy, are justiciable either at law or in equity.

IV.

DEPOSIT AND REBATES.

By the decision the defendants are given all rebates and deposits claimed except $987.48. The Court finds that this was paid to defendants on April 1, 1916.

At the trial the witness Hathaway testified that no such payment was made, to his knowledge. Plaintiff's witness testified only from an entry in the ledger and not from a book of original entry, nor from a voucher showing such payment.

It was agreed that the plaintiff might and should file copy of the original check and serve another copy upon defendants' counsel. No copy of such check has ever been served upon us, and upon inquiry from the Clerk we are informed and therefore believe, that the plaintiff has failed to file the check showing this payment. In the absence of that [166] proof we respectfully urge that the plaintiff has not only failed to prove that payment to defendants, but

that their failure to produce the check is a suppression of the best evidence, and is conclusive that no such check exists and no such payment made.

We believe, therefore, that in any event the decree should be corrected by giving us this added credit with accumulated interest.

Upon the foregoing ground, the defendants, appearing by this procedure, respectfully base their objections to the Findings and Decree as rendered, and urge a reconsideration and reargument of this cause.

Dated at Portland, Oregon, this 4th day of August, 1919.

Respectfully submitted,
CHARLES A. HARDY,
ISHAM N. SMITH,
Attorneys for Defendants.

Service accepted 8/4/19.
ROBERT TREAT PLATT,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 4, 1919. G. H. Marsh. [167]

AND AFTERWARDS, to wit, on Monday, the 6th day of October, 1919, the same being the 79th judicial day of the regular July term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [168]

In the District Court of the United States for the District of Oregon.

No. 7768.

October 6, 1919.

FORD MOTOR COMPANY

vs.

FANNIE S. WINCHELL, Administratrix, F. M. HATHAWAY et al.

Order Denying Motion for Rehearing, etc.

This cause was heard by the Court upon the petition of the defendants above named for a rehearing herein, and upon the objections of said defendants to the decree heretofore entered herein, said plaintiff appearing by Mr. Hugh Montgomery, of counsel, and the defendants by Mr. I. N. Smith, of counsel, upon consideration whereof

IT IS ORDERED that said petition for rehearing be and the same is hereby denied, and that the said objections be and the same are hereby overruled, and that the decree herein stand as entered.

R. S. BEAN

Judge.

[Endorsed]: Filed Oct. 14, 1919. G. H. Marsh, Clerk. [169]

AND AFTERWARDS, to wit, on the 4th day of December, 1919, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit: [170]

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Petition for Appeal.

To Honorable ROBERT S. BEAN, District Judge of the United States Court, for the District of Oregon:

The above defendants, F. M. Hathaway and Fannie S. Winchell as administratrix of the estate of V. W. Winchell, deceased, and F. M. Hathaway as administrator of the partnership estate of V. W. Winchell and F. M. Hathaway, copartners, formerly doing business under the firm name and style of Eugene

Ford Auto Company, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 28th day of July, 1919, and by the order entered on October 6th, 1919, refusing to grant the motion for rehearing and reargument and overruling the objections of said defendants to said decree do hereby appeal from said decree and from the said order to the Circuit Court of Appeals of the United States for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that this appeal be allowed; that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, under the rules of this court, in such case made and provided. [171]

And your petitioners further pray that the proper order relating to security for costs to be required of them be made.

F. M. HATHAWAY and
FANNIE S. WINCHELL,

As Administratrix of the Estate of V. W. Winchell, Deceased, and F. M. Hathaway, as Administrator of the Partnership Estate of V. W. Winchell and F. M. Hathaway, Copartners, Formerly Doing Business Under the Firm Name and Style of Eugene Ford Auto Company.

By ISHAM N. SMITH,
Their Attorney,

P. O. Address, 612 American Bank Bldg., Seattle, Washington.

The appeal prayed for in the foregoing petition is allowed and bond for appeal as required by law is fixed at the sum of $14,000.00.

CHAS. E. WOLVERTON,
United States District Judge for the District of Oregon, Who Tried the Above Cause.

Due service of within this —— day of December, 1919.

HUGH MONTGOMERY,
PLATT & PLATT,
Solicitors for Plaintiff.

[Endorsed]: Filed Dec. 4, 1919. G. H. Marsh, Clerk. [172]

AND AFTERWARDS, to wit, on the 4th day of December, 1919, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [173]

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M.

HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Defendants.

Assignments of Errors.

Now come the defendants in the above-entitled cause, to wit, F. M. Hathaway and Fannie S. Winchell, as administratrix of the estate of V. W. Winchell, deceased, and F. M. Hathaway, as administrator of the partnership estate of V. W. Winchell and F. M. Hathaway, copartners, formerly doing business under the firm name and style of Eugene Ford Auto Company, and file the following assignments of errors upon which they will rely on their prosecution of this appeal in the above-entitled cause from the decree made by this Honorable Court on July 28th, 1919, and from the order overruling the motion for rehearing and reargument and objections to said decree made and entered on October 6th, 1919, to the United States Circuit Court of Appeals for the Ninth Circuit.

The Court erred against the just rights of these defendants:

I.

In denying and refusing the motion of these defendants to strike the amended bill of complaint from the files and for judgment of dismissal of the cause upon all the grounds and for all the reasons set forth in said motion, to wit:

That at the time said motion was made, there had been filed in this cause the printed transcript on writ

of error in the law action of the Ford Motor Company, the plaintiff above [174] named, against V. W. Winchell and F. M. Hathaway and others heretofore determined in this cause, and which said action was commenced in this court by this plaintiff on the 27th day of May, 1916, and is referred to in the amended bill of complaint, and that said transcript of error was theretofore filed in this cause on motion for a temporary injunction herein; and for the purpose of this motion this court is respectfully asked to take judicial notice and knowledge of the written record and files of this cause, including the original bill of complaint and the transcript on writ of error in the said law action between the parties hereto.

The defendants move to dismiss and to strike the amended bill of complaint from the files for and judgment dismissing this cause for the following reasons:

(1) By the said law action which was affirmed by the Circuit Court of Appeals of the United States for the Ninth Judicial District, these defendants were adjudged to be the owners of the automobiles involved in that case and referred to in the alleged limited agency contract, a copy of which contract is attached to the amended bill of complaint herein:

(2) By verdict in the law action and the said judgment which was affirmed by the United States Circuit Court of Appeals, these defendants were adjudged to be the owners of said property at the time the said law action was instituted.

II.

That the said automobiles so owned by the defend-

ants are the same automobiles referred to in plaintiff's amended bill of complaint herein, as shown by the records and files in said action.

III.

That by reason of the ownership of such automobiles by the said defendants, the said defendants mortgaged them to the First National Bank of Eugene, Oregon, and said mortgage was made by these defendants individually and is the mortgage referred [175] to in Paragraph 6 of the amended bill of complaint herein; and that the allegations in said paragraph 6 of the said amended bill of complaint from lines 11 to 18 inclusive thereof, are shown to be untrue by the records in this case.

That neither the alleged agency contract, nor any relation shows that these defendants made this mortgage as the agent of the plaintiff and that there is no provision in the said alleged agency contract authorizing these defendants to mortgage any property belonging to plaintiff for plaintiff.

That in mortgaging said property for their own benefit, these defendants acted within their rights, and that they did not convert the money of plaintiff, or any of plaintiff's money to their own use.

That said paragraph 6 of said amended bill of complaint wherein it charges the facts and things set forth at lines 11 to 18 thereof, is false and untrue and stultifies the record as herein shown.

That in the said replevin action, as shown by the printed transcript on writ of error therein, these defendants filed counterclaims, and the plaintiff did not plead the assignment of the alleged mortgage de-

scribed in paragraph 6 of the amended bill of complaint to the plaintiff, nor did it assert its alleged rights or any claim of right to equitable subrogation, nor did the plaintiff claim that these defendants had mortgaged their property, nor did the plaintiff set forth any claim of right or recovery by reason of the payment of the mortgage to the First National Bank of Eugene, Oregon, by plaintiff.

That this amended complaint and the entire record in this cause shows that the plaintiff in making the payment of the mortgage to the First National Bank of Eugene, Oregon, acted solely as a volunteer, and not otherwise and did not make such payment at the request of these defendants, or either of [176] them, or under any liability, either in law or equity, of plaintiff on the indebtedness secured by said mortgage.

The record on appeal in the said law action fails to show any assignment of error argued on such appeal for failure of the trial court to offset the amount paid by plaintiff on such mortgage, against the judgment awarded these defendants.

By motion for nonsuit, as shown by said transcript in the said law action, as well as by motion for directed verdict, and by the ruling of the court on the motion made by plaintiff to grant a new trial or to modify the judgment rendered therein in favor of the defendants to offset the sum paid by plaintiff to the First National Bank of Eugene, Oregon, as a counterclaim of offset against the judgment of defendants, the United States District Court for the District of Oregon, adjudged and decided that the

plaintiff is not entitled to offset or recover such amount so paid by plaintiff to the First National Bank of Eugene, Oregon; and also that the plaintiff was not entitled to be subrogated in the place of the mortgagee; and also that the plaintiff had no right in the premises.

On the said appeal of said law action, the plaintiff did not assign any of such rulings as error, and the questions involved in this suit and set forth in the amended bill of complaint herein, and asserted by reason of the pretended facts alleged in said bill of complaint and particularly in paragraph 6 of said amended bill of complaint and the following paragraphs of said amended bill of complaint have all been finally determined, decided and adjudicated adversely to the plaintiff herein.

IV.

That the replevin cause referred to in paragraph 7 of the amended bill of complaint herein and the various steps taken therein in said suit, and all of the proceedings had at the trial of said cause are all before the Court in this case, and [177] the record heretofore presented; and this court is requested to take judicial notice and knowledge, and these defendants here and now make profert thereof and demand oyer thereof.

These defendants move to strike the amended bill of complaint, and for judgment of dismissal in this cause for the further ground that said paragraph 7 of the amended bill of complaint herein shows that after the affirmance of said judgment, the plaintiff paid the same under process of this court, and that in

this cause, this plaintiff sought an injunction to restrain the enforcement of such judgment and to prevent the defendants from collecting the said judgment for all the reasons now urged in the amended bill of complaint, and that this court refused the said injunction, and no appeal was taken therefrom.

That the question of whether the said injunction should issue involves the merits of this controversy, and while the order thereon was interlocutory in form, it was final in fact, and by reason of no appeal being taken therefrom, the matter set forth in the amended bill of complaint and asserted by reason of the pretended facts alleged in paragraph 7 have been finally determined in favor of these defendants.

V.

These defendants further move to strike the amended bill of complaint from the files herein, and for a judgment of dismissal upon the ground that the matters and things set forth in paragraph 8 of said amended bill of complaint have been adjudicated adversely to plaintiff, and that by the proceedings in the law action, it was determined and adjudicated that the plaintiff made the payment to the First National Bank of Eugene, Oregon, voluntarily and without necessity in law or equity therefor, and without any request or authority, directly or impliedly of these defendants, or either of them, to make such payment, and that no relation existed between the plaintiff [178] and these defendants, or either of them, which required the plaintiff to make such payment, and that these defendants were at the time of such payment the owners of said automobiles; and

upon the further ground that the facts set forth in said paragraph show that the plaintiff made such payment without any request or authority from the defendants, and without any legal or equitable necessity or right so to do, and that the plaintiff is not entitled to ask subrogation herein.

VI.

The defendants move to strike this amended bill of complaint and for judgment of dismissal in this cause upon the further ground that paragraph 9 of the said amended bill of complaint affirmatively shows that in this court and cause the plaintiff sought to restrain the enforcement of the judgment recovered by the defendants to the amount of the payment which plaintiff made to the First National Bank of Eugene, Oregon.

VII.

The defendants further move to strike the amended bill of complaint from the files herein and for judgment of dismissal based upon the record in this case, together with the record in said replevin action between these parties upon the following grounds:

(a) That said records show that the plaintiff does not come into court with clean hands, and that the plaintiff has committed inequity in relation to the automobiles involved, and wilfully and unlawfully trespassed upon the rights of the defendants in relation thereto, and while guilty of such trespass and inequity, the plaintiff voluntarily paid the mortgage which the said defendants placed upon the said automobiles, and did not ask for or receive any assign-

ment of said mortgage, nor did the plaintiff profess to make such payment by reason of the alleged fact or claim that these defendants were the agents of plaintiff in making such mortgage, and that the pretense now set [179] forth in the amended bill of complaint herein that these defendants were the agents of plaintiff in making such mortgage, and executed such mortgage as said agents, is untrue and a sham and an attempted fraud upon this court, and is inserted by the plaintiff maliciously for the purpose of continuously harassing these defendants with vexations and groundless litigation in respect to matters already determined and settled by the Courts of the United States in favor of these defendants, and this suit is filed and the charges of embezzlement and conversion of plaintiff's money inserted in the bill of complaint against these defendants without justification or excuse, and solely for the purpose of annoying these defendants and defaming and injuring their reputation and business standing, and that the said amended bill of complaint does not state equity in favor of the plaintiff and against these defendants or either of them, or any cause of suit against these defendants or either of them.

2.

In hearing this cause and proceeding to trial and decree after the plaintiff had failed to appeal from the order dissolving the temporary injunction and refusing to continue such injunction *pendente lite.*

3.

In entering the decree for the plaintiff because the evidence shows:

(a) That the matter in controversy herein was necessarily and actually involved in the replevin action and was put in issue by plaintiff's amended complaint, especially by paragraph seven thereof in said cause, and was therefore within the issues of, or involved in the said replevin action and is *res adjudicata* herein;

(b) The defendants in said replevin action filed counterclaims arising out of and connected with the controversy in said cause which were in excess of, and greater than, the value of the property demanded by plaintiff, and that the Ford Motor [180] Company (plaintiff in said replevin action and plaintiff here) failed to file any reply in said replevin action, setting forth it's alleged or pretended right to either a legal or equitable counterclaim against defendant's claim of damages, although at said time the pretended right of plaintiff to assert a pretended counterclaim against defendants' damage claim existed, if it existed at all, by reason of the payment by the Ford Motor Company to the First National Bank of Eugene, Oregon, of the sum of money, to wit: $12,676.38, in payment of the chattel mortgage which defendants in said replevin action had given to said bank.

4.

After the entry of judgment in the replevin cause in the lower court, the Ford Motor Company made application to offset the said payment made by it to the First National Bank of Eugene, Oregon, in the sum of $12,676.38 and specified its alleged grounds for relief thereon. Such motion was denied and was

not reversed on appeal and such motion was a special application made after judgment and was reviewable on appeal and became *res adjudicata* upon the affirmance of said judgment.

5.

In the trial of said replevin action after the close of the testimony and upon motion of attorneys for defendants, the trial judge struck from the consideration of the jury all evidence relative to the payment by the Ford Motor Company of the said sum of $12,676.38, to the First National Bank of Eugene, Oregon, which motion was made upon the ground that such payment was voluntary; that the Ford Motor Company excepted to such ruling and thereafter the verdict of the jury was rendered and judgment thereupon entered, and that said judgment has been affirmed by this court without modification or allowance of said sum, and thereby the ruling of the said trial court was affirmed and the alleged rights of the Ford Motor Company to recover the said sum of $12,676.38 from these defendants was thereby adjudged adversely [181] to the said Ford Motor Company, and the gist of this equity suit became, was, and is, *res adjudicata.*

6.

The evidence introduced in said replevin case and in this case is uncontradicted and shows that the Ford Motor Company at the time of such payment of the sum of $12,676.38 to the First National Bank of Eugene, Oregon, had knowledge of all of the facts in relation to its own contract with the defendants in said replevin cause, who are defendants here and also

knew that said Ford Motor Company had begun its replevin action without tendering to the defendants the amount of their advances for the cars involved in said replevin cause, and also knew that said chattel mortgage in favor of the First National Bank of Eugene, Oregon, had been given by Winchell and Hathaway, and also knew that the said Winchell and Hathaway had paid to the Ford Motor Company a sum greater than the amount of said chattel mortgage in order to get possession of said cars originally, and with such knowledge the said Ford Motor Company was told by the agent of the First National Bank that said bank would not assign said notes secured by said chattel mortgage and would not accept anything from the said Ford Motor Company except in full payment of the claim of said bank and that the said Ford Motor Company made a voluntary payment to the First National Bank of Eugene, Oregon, of the sum set forth in the complaint herein as the basis of relief.

The evidence shows that said payment was entirely voluntary.

7.

That the contract relation between the Ford Motor Company and these defendants was wrongfully terminated by said Ford Motor Company at the time of the institution of said replevin action and that the Ford Motor Company did not make any payment to the First National Bank of Eugene, Oregon, by reason of any contract relation then existing between the Ford Motor Company and these [182] defendants, and that there was no duty by contract or by law

or by equity which required the Ford Motor Company to pay the obligation of Winchell and Hathaway to the First National Bank of Eugene, Oregon.

8.

That the evidence in this cause is insufficient to sustain the decree in favor of the plaintiff against these defendants for all the reasons herein set forth.

The Court further erred in rendering a decree herein in favor of the plaintiff and against these defendants in this; that in this suit in equity the Ford Motor Company did not come into court with clean hands because it had committed iniquity in relation to the subject matter of the controversy, to wit: the original contract between the Ford Motor Company and these defendants in this:

(a)

The Ford Motor Company wrongfully terminated said contract relation,

(b)

It did not make demand for the possession of said property involved in said replevin action before institution of this action.

(c)

It did not tender to these defendants or their predecessors the sums of money required of it to tender to them before attempt to take possession of said machines.

(d)

It trespassed upon the business of these defendants wrongfully and used the process, to wit: the replevin process issued out of the above District Court wrong-

fully and without right and maliciously abused such process. [183]

9.

The Court erred in decreeing and adjudging that plaintiff recover of and from the defendants and each of them, and have judgment and decree for the sum specified in said decree with the legal interest upon the ground and for all the reasons heretofore assigned, to wit: that the matters involved herein were, and are *res adjudicata,* and that the evidence is insufficient to sustain such decree, for all the reasons heretofore set forth.

10.

The court erred in failing to find in favor of the defendants herein and in refusing to find that the matters involved herein were, and are, *res adjudicata,* and also in failing and refusing to find herein that the payment made by the Ford Motor Company, to the First National Bank of Eugene, Oregon, was wholly voluntary.

11.

The court erred in overruling and denying the motion for rehearing and reargument, and also the objections to the said decree upon each and all of the grounds specified therein.

WHEREFORE these defendants and appellants pray that said decree be reversed and this Court enter a decree as prayed for in appellants' answer, or that said cause be reversed and remanded with such

direction further as the court shall determine proper in the premises.

ISHAM N. SMITH,
Attorney for Defendants.

P. O. Address; 612, American Bank Bldg., Seattle, Wash.

Due service of the within is hereby admitted at Portland, Ore., this —— day of December, 1919.

HUGH MONTGOMERY,
PLATT & PLATT,
Solicitors for Plaintiff.

[Endorsed]: Filed Dec. 4, 1919. G. H. Marsh, Clerk. [184]

AND AFTERWARDS, to wit, on the 4th day of December, 1919, there was duly filed in said court a statement of the evidence, in words and figures, as follows, to wit: [189]

No. 2932.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Defendants' Proposed Statement of the Case.

Defendants propose as a statement of this case, the stenographic notes of the oral testimony and the exhibits introduced in evidence.

Such stenographic notes are as follows: [190]

In the District Court of the United States for the District of Oregon.

No. 2932.

FORD MOTOR COMPANY, a Corporation,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix, etc.,

Defendants.

H. M. MONTGOMERY, Attorney for Plaintiff.

CHARLES A. HARDY, and ISHAM N. SMITH, Attorneys for Defendants.

R. S. BEAN, District Judge:

Portland, Oregon, July 18, 1919.

Hugh Montgomery..... 2
F. C. MacDougall.....12
Plaintiff rests..... 4
P. E. Snodgrass..... 5
F. M. Hathaway.....17
Defense rests.....24
George W. Alling.....25

[191]

Portland, Oregon, Friday July 18, 1919.

Mr. MONTGOMERY.—I offer in evidence a telegram and letter showing the cancellation of the contract between the plaintiff and the defendant.

Mr. SMITH.—Objected to as having been in issue and tried and disposed of in a former case.

COURT.—It will be admitted subject to your objection.

Mr. SMITH.—We want it understood that during the progress of this trial that the objections overruled and all the adverse rulings are excepted to.

Telegram marked Plaintiff's Exhibit 1.

Letter marked Plaintiff's Exhibit 2.

Mr. MONTGOMERY.—I desire to offer in evidence certain portion of the evidence offered in the trial of the case Ford Motor Company vs. V. W. Winchell and F. M. Hathaway.

Mr. SMITH.—In order to save time, we will agree, if you will, that the entire printed record may go in evidence and we can object to such portions of it as we may wish.

Mr. MONTGOMERY.—That is satisfactory to me.

Marked Plaintiff's Exhibit 3. [192]

Testimony of Hugh Montgomery, for Plaintiff.

HUGH MONTGOMERY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination (Without Questioning).

Mr. MONTGOMERY.—After the sending down of the mandate in the case of the Ford Motor Company vs. Winchell, I was approached by Mr. Logan, repre-

(Testimony of Hugh Montgomery.)

senting Messrs. Winchell & Hathaway, I at the time representing the Ford Motor Company, and asked when we intended to pay the judgment which had been entered in that case, and was told by Mr. Logan, representing Messrs. Winchell and Hathaway, that if the judgment was not paid execution would issue, and acting upon that statement of Mr. Logan I took the matter up with the Ford Motor Company, and we procured the necessary funds and satisfied the judgment upon the face of the record, which was the judgment entered in the replevin case, and would not have so satisfied it at that time had it not been for the statement that execution would be levied.

Cross-examination.

(Questions by Mr. HARDY.)

Is it not a fact, Mr. Montgomery, that before paying the judgment you filed the original bill in this suit and procured an order to show cause why temporary restraining order should not be issued from this court, and pending that hearing an order restraining Winchell and Hathaway from issuing any execution?

A. My reply is that prior to the time the mandate came down from the Circuit Court of Appeals an application was made in the [193] early stages of the present proceeding for an injunction and a temporary order was issued, and thereafter dissolved.

Q. The court's records will disclose what the facts are in regard to that. A. Yes.

Q. And refreshing your recollection again as to your original bill of complaint, don't you remember

(Testimony of Hugh Montgomery.)

now that the mandate had come down when you filed the original bill; no execution had been issued, and you procured a temporary restraining order against the issuance of an execution, and it was so set out in your original bill of complaint?

A. I haven't verified that question recently, but my best recollection is that the first application was before the mandate came down. If I am not correct on that, correct me.

Q. Of course, the original bill filed here will show.

A. Yes, I have not verified that.

Q. Then, after it was set down for hearing, it was heard by this Court?

A. A hearing was had, yes.

Q. And the Court dissolved the temporary restraining order and denied—and on a motion to show cause, denied a restraining order pending this suit?

A. Yes, that is a fact. The restraining order was denied and my recollection is it was on the basis we had not established the insolvency of the defendants.

Q. And then, without any execution being actually issued, you paid the judgment. That is true, is it not, and it was satisfied?

A. That is true, but I said in my direct testimony on the [194] statement of Mr. Logan that execution would issue otherwise.

Q. You took no appeal from the order of the Court denying the temporary restraining order?

A. I did not.

Q. And the original suit was for an injunction and to offset against that judgment the same demand that

(Testimony of Hugh Montgomery.)

you are now making in this suit, was it not?

A. I think that is a correct statement. As I say, I have not recently read that original bill, but I think that is a correct statement.

Mr. HARDY.—That is all.

Witness excused.

Mr. MONTGOMERY.—That is all the evidence we have to offer until Mr. McDougall comes in.

Mr. SMITH.—Of course, we understand, as a matter of legal formality, you filed a denial to our counterclaim?

Mr. MONTGOMERY.—The reply as filed denies that the amounts set forth are due and owing.

Mr. SMITH.—You admit the amounts are correct.

Mr. MONTGOMERY.—We admit the amount of $800.00 is correct statement of the amount originally paid as deposit money, but we deny the sum of $1,900.-60 is the correct statement of the amount of rebate.

Mr. SMITH.—Very well. [195]

Testimony of P. E. Snodgrass, for Defendants.

P. E. SNODGRASS, a witness called on behalf of the defendants being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HARDY.)

You are the president of the First National Bank of Eugene? A. I am.

Q. And you know Mr. Hathaway, one of the defendants in this case? A. I do.

(Testimony of P. E. Snodgrass.)

Q. And you knew, of course, Mr. Winchell before his death? A. I did.

Q. Mr. Snodgrass, as president of the bank, did you make loans to Winchell & Hathaway, for the bank?

A. I did, in connection with other officers of the bank, yes, sir. In this particular case, I don't remember whether I made this particular loan, or whether the cashier of the bank made it.

Q. It is set out in the answer here that certain notes were executed by Winchell & Hathaway to the First National Bank, being notes for about $2,800.00 each, aggregating some $40,000.00. Do you recall those notes? A. I do.

Q. Were the moneys represented by these promissory notes loaned to Winchell & Hathaway as individuals or otherwise?

A. It was loaned to them as individuals.

Q. And on their individual credit?

A. On their individual credit*ed,* secured by chattel mortgage on the cars.

Q. When these notes were paid, was the business transacted with you personally, in the matter of the payment of the notes? [196]

A. Well, I had intimate knowledge of the transaction. Our note teller actually handled the—

Q. But you were present?

A. Yes, I was present.

Q. Do you remember the name of the gentleman that paid these notes to you? A. No, I do not.

Q. If I may be permitted to refresh your recollection, was the name Mr. Godon?

(Testimony of P. E. Snodgrass.)

A. I couldn't say. He was the representative of the Ford people from Portland.

Q. And at the time these notes were paid by this gentleman, do you know whether that was done with the knowledge or consent of Winchell or Hathaway?

A. No, I do not.

Q. As far as you know, it was not with their knowledge or consent?

A. It was not with their—I am sure it was not with their consent. The negotiations for settlement had been pending a day or two or three, and they may have had knowledge that the Ford people intended to—

Q. As far as you know, they were not present when the notes were paid, and it was done without even their knowledge?

A. I am positive they were not present.

Q. If they say it was without their knowledge, you would not dispute that? A. No, I would not.

Q. What did you do when these notes were paid, and you received the money? What did you do with the notes?

A. Our note teller cancelled them in the usual way, and we supplied them with cancellation of the chattel mortgage. [197]

Q. Thereafter did the Ford Motor Car Company, through any representative of theirs, call on you again with reference to these notes? A. They did.

Q. What did they ask you to do?

A. They asked that we change our cancellation record put on the notes, mark it as an error to erase

(Testimony of P. E. Snodgrass.)

it and give them a transfer of the notes and chattel mortgage.

Q. Will you please give your best recollection of about how long it was after these gentlemen had paid these notes, that this request for a change of the record was made to the bank?

A. Well, I couldn't say as to that. It might have been a week or it might have been a month, or even longer. It was, I think, at least several days after.

Q. You knew this original case, replevin action, was pending against these parties at that time?

A. I did, yes, sir.

Q. Was the request made more than once that you alter your records and change that transaction?

A. It was made at least twice.

Q. At least twice? A. Yes.

Q. Did you decline? A. We declined.

Cross-examination.

(Questions by Mr. MONTGOMERY.)

Now, Mr. Snodgrass, when you said that this loan was made upon the individual credit of Messrs. Winchell [198] and Hathaway—I understood you to say it was. That is correct? A. Yes, sir.

Q. Then, why was it necessary for the bank to take a chattel mortgage on these cars?

A. That would be additional security.

Q. Additional security to the credit of Winchell and Hathaway

A. In addition to their personal credit same as we frequently take security from people that we loan to.

(Testimony of P. E. Snodgrass.)

Q. And in whom did you understand the title to the cars was at that time?

A. We supposed they belonged to Messrs. Winchell and Hathaway. Had no knowledge of any other claim.

Q. I also understood you, didn't I, that you really don't know whether or not they objected to the payment of this amount—that is Messrs. Winchell and Hathaway?

A. They didn't make any objection to the bank. I am sure they made no objection.

Q. Has the amount evidenced by these notes and mortgage ever been paid to the bank by Messrs. Winchell and Hathaway in addition to the payment made by the Ford Company? A. It has not.

Q. Then, in so far as the records of the bank show, and in so far as the real facts are, Messrs. Winchell and Hathaway have received some twelve thousand odd dollars—the exact amount I have not just before me; whatever the amount of the payment of the Ford Company was—from the bank as a loan and likewise received the benefit of the payment to the bank by the Ford Company. That is a fact, is it not? [199]

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial on the point, if the Court please, there is no relation shown between the Ford people and Winchell and Hathaway that would authorize them or justify them to make payments on our behalf, and has been no requests shown. The testimony is only that it has been paid.

(Testimony of P. E. Snodgrass.)

COURT.—For the purpose of showing no other payment only.

A. The amount as evidenced by the notes was advanced to Hathaway and Winchell. The notes were paid by the representatives of the Ford people, and the bank has not received any other payment.

Q. Did you or the First National Bank ever receive any instructions from the Ford Motor Co. with reference to the payment of this money, through the United States National Bank of Portland?

A. No, sir.

Q. Are you certain of that?

A. The money was wired, as I remember it, by the United States National Bank of Portland, to be paid to this man who was the representative of the Ford people. I knew the name and met the man at the time, and had known him before, but to just recall that name, I don't know. I suppose Godon was the name, but I don't recall it. The money was wired by the United States National Bank to be paid by them, but were no instructions by United States National Bank as to what the money was to be used for, or no instructions in that connection that I can recall.

Q. Now, just how soon after the payment of these notes by the Ford Motor Company, or the money that was tendered to the bank and accepted by the bank, did they come back and make this request on you which you have referred to for a change of the [200] bank's record?

A. Well, I couldn't tell you the exact number of days or weeks. As near as I can remember it will be

(Testimony of P. E. Snodgrass.)

several days, perhaps a month or even more.

Q. I was not quite clear in your direct testimony, or I did not quite understand the exact statement which you say was made to the Ford Company at that time. Will you restate that, please, with reference to the changing of your records. What was the request?

A. They requested that we change our endorsement our paid stamp endorsements on the notes.

Q. To what?

A. And make a transfer of the notes to them instead of cancellation of the notes.

Q. That is an assignment of the notes and security to the Ford Motor Company?

A. An assignment of the notes to the Ford Motor Company instead of cancellation of the notes as paid.

Q. And likewise an assignment of the mortgage.

A. Yes.

Q. And what was the reason that the bank refused to conform to that request?

A. Well, I told them that we had closed the transaction and that we would not now, after the question had gone into court and been raised, be a party to the changing of our records and be put in that position. Between ourselves and our customers we are in court. The records and the cancellation must stand.

Q. Why did the bank accept the money at that time?

A. We were acting under the advice of our attor-

(Testimony of P. E. Snodgrass.)

ney who knew that [201] there was a controversy, and the question being raised as to the ownership of the cars, and he advised us if they wanted to pay the notes, to accept it.

Q. May I ask who that attorney was?

A. Mr. Bryson, E. R. Bryson, of the firm of Smith & Bryson.

Redirect Examination.

(Questions by Mr. HARDY.)

Q. Did the bank not also on this occasion, whether it was a week or a month after this transaction was closed and this request was made—also state that the bank would not be disposed to sell to the Ford Motor Car Company the obligation of Winchell and Hathaway to the bank? That is your custom, you would not sell your customers' notes?

A. I think there was, yes—there was some such offer.

Q. That was against the policy of the bank?

A. It would be against the policy of the bank to do so without knowing it would be agreeable to our customer.

Q. Mr. Bryson, your attorney, was in no way connected, in no way whatever, with Winchell & Hathaway, was he? A. I don't think he was.

Q. Or with the Ford Motor Company?

A. In no way, as far as I know.

Mr. HARDY.—That is all.

Witness excused. [202]

Testimony of F. C. MacDougall, for Plaintiff.

F. C. MacDOUGALL, a witness called on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY.)

Q. You are an attorney, aren't you, Mr. MacDougall? A. Yes, sir.

Q. And you were in the spring of 1917 attorney for the Ford Motor Company?

A. My brother and I were, yes, sir.

Q. In connection with the case of the Ford Motor Co. vs. Winchell and Hathaway for the replevin of thirty-six touring cars? A. Yes, sir.

Q. Now, in connection with that proceeding a payment was made, if you recall, to the First National Bank of Eugene, Oregon of the sum of $12,676.38. I wish you would state the reason and purpose of making that payment by the Ford Motor Company.

Mr. SMITH.—Object to that as incompetent, irrelevant and immaterial. The private reasons of either the agent or the Ford Motor Car Company itself would have no bearing upon this claim for subrogation.

COURT.—Answer the question subject to that objection.

A. Well, it was for the—the payment was made to the bank for the purpose of relieving this lien which the firm of Winchell and Hathaway had placed upon the automobiles in the way of a mortgage.

(Testimony of F. C. Macdougall.)

Q. Now, do you know whether or not this $12,676.38 was a part [203] of the money which was originally obtained to use as a tender to Winchell and Hathaway?

Mr. SMITH.—That is objected to as incompetent, irrelevant and immaterial and not involved in the other case. No such tender made—if I heard the question.

Mr. MONTGOMERY.—I asked if it was money obtained for the purpose of use as a tender. That is the allegation of the complaint.

Mr. SMITH.—Wholly immaterial.

A. I don't know. Whoever—Mr. Godon—made the payment there. I couldn't say what money he did use there.

Q. Now, the amount recovered in the jugment against the Ford Motor Company was $16,077.50. Do you recall whether that is the same amount as 85% advanced upon the cars?

A. I don't recall; I have very near forgotten the case.

Cross-examination.

(Questions by Mr. SMITH.)

Q. Mr. Macdougall, this payment matter was handled by Mr. Godon, was it not? A. Yes.

Q. You were not even a witness to it?

A. No, sir.

Q. And all you had to do with the case came in afterwards? A. Yes, sir.

Q. You were a witness at the other trial, in the replevin action were you not?

(Testimony of F. C. Macdougall.)

A. No, sir, I was not.

Witness excused. [204]

Mr. HARDY.—Your Honor, we have set up in our answer in this case the dates and amounts of the various notes that were made by Winchell and Hathaway to the First National Bank, and which were paid by Mr. Godon at the time referred to in Mr. Snodgrass' testimony, and Mr. Montgomery tells me he will stipulate that the allegations of the answer as to the dates of the notes and the amounts are correct.

Mr. MONTGOMERY.—In connection with the stipulation do I understand, Mr. Hardy, that you claim that the amount set forth in this answer relates to property other than the thirty-six cars involved in this case?

Mr. HARDY.—It is also alleged in the answer that these notes were secured by two separate mortgages; one chattel mortgage covered eight automobiles, and the other covered twenty-four automobiles. I took that from the record, and the reason I didn't bring the certified copy, I thought you had these notes.

Mr. MONTGOMERY.—The only reason I asked the last question—I am willing to stipulate that the amount set forth in the answer is a correct statement of the amount contained in the notes but I don't want to be bound by any conclusion in the answer that it included property not involved in the Winchell and Hathaway case.

Mr. SMITH.—You stipulate as to the dates of the notes?

Mr. MONTGOMERY.—Yes, and the amounts therein set forth.

Mr. SMITH.—In order to verify the record, in the absence of the original mortgages, I suppose we can agree, if Mr. Montgomery will, that we can supply the record with certified copy of the mortgages within ten days.

Mr. MONTGOMERY.—That is satisfactory.

Mr. HARDY.—If your Honor please, in support of our plea [205] of *res adjudicata*, we wish to offer the judgment-roll in case No. 7027, Ford Motor Car Company vs. Winchell & Hathaway, and I presume, as this is in the custody of the clerk it becomes necessary that we substitute a copy.

COURT.—I understood it to be in that abstract.

Mr. MONTGOMERY.—I think it is in that record. For the purpose of preserving the record, I wish to interpose the formal objection to the introduction upon the ground that it appears from the face of the record that the question, as I understand it, as to the payment and the right to recover the payment of $12,077.50 in the replevin action was expressly withdrawn from the jury by the instructions of the Court.

COURT.—Very well.

Record marked Defendants' Exhibit "A."

Mr. HARDY.—We also wish to offer the original bill of exceptions in the case, for the same purpose.

Marked Defendants' Exhibit "B."

Mr. HARDY.—We also desire to offer, your Honor, the exhibits in the action just referred to, with respect to the paid invoices and the receipts, showing

that these cars belonged to us, and that issue was adjudicated in that case.

Mr. MONTGOMERY.—I of course, desire to interpose objection to that evidence upon the ground that it appears from the face of the record in the prior case that these cars were sold under a conditional sales contract, the validity of which has been subsequently affirmed in the Circuit Court of Appeals, and in the case of the Ford Motor Company vs. Winchell & Hathaway the only point, as I interpret the decision of the Circuit Court of Appeals,—the only point adjudicated in that case was [206] the fact that proper steps had not been taken to allow the preliminary foundation for an action at replevin, but the Court in that case did not undertake to determine the question of the title to the property, or the validity of the contract between the parties, but expressly eliminated that from its decision.

Papers marked Defendants' Exhibit "C."

Mr. MONTGOMERY.—Let the record show if there are any discrepancies between the copy attached to the complaint and the original contract, they may be corrected.

Mr. HARDY.—We now offer, your Honor, the exhibit of the contract between the Ford Motor Car Company and Winchell & Hathaway that was received in evidence in the replevin action, for the purpose of showing that it was an issue in that action—the same contract that is set out in the complaint here.

Mr. MONTGOMERY.—Object to that on the ground the decision of the Circuit Court of Appeals

expressly eliminates the contract.

Marked Defendants' Exhibit "D."

Mr. HARDY.—I presume the judgment-roll contains that motion for a new trial and for setoff.

Mr. MONTGOMERY.—Likewise in the transcript.

Mr. HARDY.—I now desire, if your Honor please, to offer in evidence the briefs which apply to the respective parties in the replevin action.

Mr. MONTGOMERY.—I don't think I have any objection.

Mr. HARDY.—May we ask your Honor to take judicial notice of the reported case in the "Federal Reporter" which applied in that action.

Mr. MONTGOMERY.—I consent that he may.

COURT.—Yes. [207]

Testimony of F. M. Hathaway, for Defendants.

F. M. HATHAWAY, one of the defendants, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(Questions by Mr. HARDY.)

Q. You are the defendant in this case and was the administrator of the partnership estate of Winchell & Hathaway? A. Yes, sir.

Q. Your partner, Mr. Winchell, died as the result of influenza and pneumonia last winter, didn't he, while that suit was pending? A. Yes, sir.

Q. You were present at the trial of the replevin action? A. Yes, sir.

Q. And the testimony of V W. Winchell as contained in the bill of exceptions is the same V. W.

(Testimony of F. M. Hathaway.)

Winchell who is deceased, and who was a defendant in this suit, and whose administrator has been substituted?

A. Yes, sir.

Q. Mr. Hathaway, at the time Mr. Godon if he was the person, or representative of the Ford Motor Company, paid certain notes of Winchell and Hathaway at the First National Bank of Eugene, Oregon, as Mr. Snodgrass has just testified, were you present when that was done? A. No, sir.

Q. Was it done with your knowledge? A. No.

Q. Or your consent? A. No, sir.

Q. Or with Mr. Winchell's knowledge or consent?

A. No, sir.

Q. Did you know of the actual payment of the notes until after it had been made? [208]

A. It was the day after, as I remember it.

Q. Someone told you that they had paid your notes? A. Yes, sir.

Q. Mr. Hathaway in borrowing the money from the bank—in borrowing the particular money represented by the notes set out in your answer, from whom did you borrow the money?

A. Borrowed the money from the First National Bank of Eugene.

Q. For whom?

A. For our own personal use.

Q. I will ask you whether or not you borrowed it on your individual credit. A. Yes, sir.

Q. Was this money that you borrowed, borrowed for the Ford Motor Car Company? Did the Ford

(Testimony of F. M. Hathaway.)

Motor Car Company have anything to do with the borrowing of this money?

A. The Ford Motor Car Company didn't know anything about that transaction.

Q. Did you borrow it for them or did they have anything to do with it?

A. They had nothing to do with it whatever.

Q. Did you borrow any money from the bank for the Ford Motor Car Company and convert it to your own use? A. We had no authority whatever.

Q. Did you do anything of the kind?

A. No, sir.

Q. Whose property, if any, did you mortgage to the bank to secure payment of the notes?

A. Mortgaged our own property.

Q. Was it property that you owned and had paid for? A. Yes, sir.

Q. And for which you held receipts in full?

A. Yes, sir. [209]

Q. And you are familiar with these paid drafts—paid invoices and receipts that have been offered in evidence in this case? A. Yes, sir.

Q. Do those represent property which you had paid for and which belonged to you, and that you mortgaged? A. Yes, sir.

Q. You treated the property as your own?

A. Yes sir.

Q. And I will ask you whether or not you paid in full for the Ford automobiles that you mortgaged before you took them from the railroad company.

(Testimony of F. M. Hathaway.)

A. According to our contract it was necessary for us to lift the drafts before we received any bill of lading. In fact the Ford Motor Company mailed those drafts to the FirstNational Bank and then in turn the First National Bank notified us that the drafts were there, waiting us.

Q. Did the cars come into your possession until you had paid for them? A. No, no.

Q. Mr. Hathaway, at the beginning of the year in question, you were buying Ford Motor cars, did you make any deposit with the Ford Motor Car Company of your money?

A. Our contract called for an $800.00 deposit.

Q. Did you make the deposit? A. Yes, sir.

Q. Did you ever get the money back from the Ford Motor Car Company? A. Never have.

Q. Have they promised to pay it back?

A. Supposed to be paid back at the end of the time that the contract expired.

Q. This contract that is in evidence covers that point? [210] A. Yes.

Q. But you have never received it. Now, you paid a certain amount of money for these cars at the time of the purchase and delivery? A. Yes, sir.

Q. Do you recall the provision of the contract that is in evidence relative to getting a rebate in the event that you bought or purchased a certain number of cars—getting a discount or rebate?

A. There was a graded scale of a certain amount—an additional commission on volume of business; if I remember right, it increased according—oh, like

(Testimony of F. M. Hathaway.)

one per cent for each ten thousand dollars worth of business. The contract will show the exact amount, but that is just about the figures.

Q. Then after you had bought and paid for the cars, if the amount of merchandise that you purchased from the Ford Motor Company reached certain figures, they sent you back part of your money—is that right—or sent you back a certain rebate

A. Yes, sir. It was just a matter of purchasing the cars from the factory; wouldn't make any difference whether they were sold; simply that they were paid for.

Q. Now, you allege in your complaint that you purchased upwards of 179 automobiles during the year in question in this case? A. Yes.

Q. Is that correct? A. Yes, sir.

Q. And that would entitled you to a rebate of $1900.60. Is that correct, approximately?

A. That is approximately correct.

Q. Have they ever paid you that money? [211]

A. No, sir.

Q. Have you ever demanded the money from them? A. Yes, sir.

Cross-examination.

(Questions by Mr. MONTGOMERY.)

This money, that is the money part of which is made up of the $12,676.38 being sued for in this case, and which was procured by you from the First National Bank on the thirty-six touring cars, was procured by you before you received the notice of the cancellation of the contract by the Ford Motor Com-

(Testimony of F. M. Hathaway.)

pany, was it not? A. Yes, sir.

Q. And at the time that this money was procured the bank required from you a mortgage upon these thirty-six Ford touring cars, before advancing the money, didn't they? A. Yes, sir.

Mr. HARDY.—It is thirty-two.

Q. Now, this property, that is the touring cars upon which this mortgage was given, were purchased under the regular sales contract which then existed between you and the Ford Motor Company, were they not? A. Yes, sir.

Q. And the transaction by which you gained possession of these cars, which you say you paid for in full, was the ordinary transaction whereby you deposited 85% of the purchase price, was it not?

A. We bought these cars on a wholesale basis, 85% of the retail price.

Q. Possibly you don't quite understand what I am getting at. You testified a moment ago that these cars were obtained [212] under the regular sales contract. That is correct, is it not?

A. Yes, sir.

Q. And when you obtained possession of them you paid the 85% as required by the contract, didn't you? That is the way you obtained possession of them?

A. You mean 85% of the selling price?

Q. Well, to make myself a little more clear possibly: Under the contract and according to the contract under which you purchased you were obliged to pay an advance 85%, were you not, of the purchase price of the car? A. No, sir.

Q. What did you do?

(Testimony of F. M. Hathaway.)

A. We paid the full purchase price of these cars.

Q. What did the contract call for?

A. Whatever it reads.

Q. You know, as a matter of fact, it reads 85%, don't you?

Mr. SMITH.—I think, as a matter of fact, that is a matter as to the relationship of these parties and I think counsel and I are about of one mind. As I recall the provisions, I think Ford fixed the retail price; that is where we claim conflict with the Sherman law; and they paid 85% of the retail price—what he calls the wholesale price.

Mr. MONTGOMERY.—I simply desire to have the witness state the manner of the payment. He said paid in full.

Mr. SMITH.—Paid in cash.

Q. You paid 85% as provided in the contract, didn't you?

A. Of what the Ford Motor Company called the retail price.

Q. Now, when you speak of these 179 cars, weren't part of those sold to some subagents who were entitled to receive rebates?

Mr. SMITH.—Objected to as incompetent, irrelevant and [213] immaterial; has nothing to do with this case, if the Court please. No such defense set up.

Mr. MONTGOMERY.—They claim rebate on 179 cars, and the inquiry was merely that I was going into the amount which the witness stated.

Mr. SMITH.—No objection as to the amount but I object to the question as to whether or not any sub-

(Testimony of F. M. Hathaway.)

agents were entitled to any part of it.

Q. I will change the form of the question. Did you purchase this entire amount of 179 cars yourself?

A. Yes, sir.

Q. Did you earn the rebate on each one of them yourself? A. Yes, sir.

Q. And no subagents were entitled to any rebate on it?

Mr. SMITH.—Object as incompetent, irrelevant and immaterial.

COURT.—He can answer the question.

A. I believe if you will refer to that contract, if we have a subagent under us that this subagent looks to us for any rebates he is entitled to.

Q. As a matter of fact if that subagent has received part of his rebates, do you know it, or don't you?

A. There was no subagent at that time entitled to any rebate.

Q. Now, upon what basis do you compute this amount of $1,960?

A. Have you made up a computation?

A. We figured it out according to the contract specifications.

Q. Now, as a matter of fact, Mr. Hathaway, you and Mr. Winchell, your partner, have never paid this $12,676.38 to the First National Bank of Eugene, have you?

Mr. SMITH.—Object as incompetent, irrelevant and immaterial. [214]

COURT.—I think that is a material question in

(Testimony of F. M. Hathaway.)

the case. Whether it has any effect upon the recovery or not is a different question. You can answer.

A. Yes, sir.

Q. And you did actually receive that amount from the First National Bank of Eugene, didn't you?

A. From the fact that the notes are cancelled we have never had to pay them.

Q. The question was, Mr. Hathaway, did you in the first instance receive that amount from the bank?

A. The fact that the notes were cancelled, we would have that credit of course.

COURT.—At the time you gave the notes you received the money, didn't you?

A. Oh, yes, sir. I didn't understand you.

Witness excused.

Defense rests. [215]

Testimony of George W. Alling, for Plaintiff.

GEORGE W. ALLING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY.)

Q. Mr. Alling, in what line of business are you engaged?

A. I am with the Ford Motor Company.

Q. In what capacity?

A. Principally as accountant and general office work.

Q. Have you the custody of the records and books of the Portland branch of the Ford Motor Company,

(Testimony of George W. Alling.)

showing the transactions between the Ford Motor Company and Winchell & Hathaway of Eugene?

A. Just at the present time.

Q. There is set forth in the answer filed in this case a claim of $1,900.60 for rebates to which Messrs. Winchell & Hathaway claim they are entitled. I wish you would state into the record and for the information of the Court the exact figures constituting that rebate, as shown by the records of the Ford Motor Company.

A. We figure a balance due of $1,338.10.

Q. A balance due to whom?

A. Balance due as rebate of $1,338.10.

Q. Just advise the Court how you arrive at that computation.

A. The total rebate due, as we figured it, was $2,325.58, of which they were paid $987.48, leaving a balance as I figure of $1,338.10.

COURT.—Leaving a balance of what?

A. $1,338.10. [216]

COURT.—How do you arrive at that conclusion? How many cars did they purchase?

A. Those figures have not all been added together.

Q. Have you a copy of that typewritten statement, showing this computation, you showed me yesterday? A. None other than this.

Q. I though you had a typewritten computation yesterday attached to letter.

A. Only the totals, 116 cars.

COURT.—116. How many do those receipted bills show?

Mr. SMITH.—We are claiming in 179.

(Testimony of George W. Alling.)

COURT.—I know, but I don't know whether you have checked up these receipted bills.

Mr. HARDY.—Some of these receipted bills were offered in evidence at the former trial, showing a continuing custom of doing business.

COURT.—Never mind, if you haven't checked them up. It doesn't make any difference.

Q. Mr. Alling, have you computed whether or not the $16,077.50 which was recovered in the replevin action is the same as the 85% advanced on the cars?

A. As near as I can figure approximately that, plus the freight charges they would have to pay.

Cross-examination.

(Questions by Mr. HARDY.)

Mr. Alling, you say the record shows a payment on this rebate of $987.48. Will you kindly produce the voucher, cancelled check, anything to show such a payment?

A. All I have here is the stamp that it was paid on April 12, 1916, No. 7416. [217]

Mr. MONTGOMERY.—Produce the document to which you have just referred, Mr. Alling. (Witness does so. What is the document you have just handed me?

A. That is a statement of purchases.

Mr. MONTGOMERY.—From what is this taken?

A. Taken from the transcript of the sales record.

Mr. MONTGOMERY.—Is this an original entry of the records of the Ford Motor Company.

A. That is merely compiled for arriving at the amount to be paid them.

(Testimony of George W. Alling.)

COURT.—Not a record kept as the cars are sold? Not an account with Hathaway originally?

A. Oh, no.

Mr. MONTGOMERY.—In what form is that kept, Mr. Alling?

A. That is kept in the ledger.

Mr. MONTGOMERY.—Can you produce the ledger? Have you the ledger here?

A. Not here, no. That will merely show the total amounts.

Mr. MONTGOMERY.—I might state to the Court I understood from the witness in talking with him that this was the original document from which the ledger was compiled. That is the reason we don't have the ledger.

A. This is compiled from the ledger.

Mr. MONTGOMERY.—This instrument you have handed me was compiled from the ledger?

A. Yes.

Mr. HARDY.—I don't think it is competent.

Mr. MONTGOMERY.—I don't intend to offer it.

Q. (Mr. HARDY.) Now, surely, in the records of the Ford Motor Car Company here in Portland, this branch house, if there had ever been any check or draft of that amount sent to Winchell & [218] Hathaway, you could produce the voucher?

A. I could produce it, yes.

Q. For the rebate, that is.

A. Had I any knowledge it was required.

Q. On the other hand if in truth and in fact this was never paid, but this is some bookkeeping entry

(Testimony of George W. Alling.)

that is made perhaps by the Ford Motor Car Company to take care of this account on some charge they are trying to make against Winchell & Hathaway, why, you would not know it from this statement, would you?

A. Other than the notation there; the check number and date is noted on that sheet.

Q. Why haven't you gone through the files and records there and undertaken to find out how this was paid?

A. I had no knowledge of this case whatever until yesterday afternoon.

Q. Well, you don't know as a fact that it was paid at all, do you?

A. No other evidence than that the check is entered on our books as having been paid.

Q. I see. It is purely hearsay with you from some notation on this sheet.

A. No, the check is entered in our ledger; if it had not been paid the entry would not be in the ledger.

Q. Do you mean to say you have evidence of the actual check of that amount of money was issued and paid and sent to Winchell & Hathaway?

A. I have this entry in the ledger. I can produce the check if I have time to look it up.

Q. A bookkeeper could make an entry of a credit of $987.48 without in fact a check or draft or money having been paid out, couldn't he? [219]

A. Oh, yes, he could.

Q. And that is all you know about it. There is such a credit on the books there in the company's office. Isn't that true? A. Yes.

(Testimony of George W. Alling.)

Q. You have no evidence or knowledge of the actual payment of your own, have you?

A. I haven't the check itself without the time to look it up, no.

Q. Now, as an accountant, before you would audit such a statement you would have to have the voucher, the evidence of the actual payment, wouldn't you, before you?

A. I have had no time to procure that. As I say I had no knowledge of this case until yesterday.

Q. As an accountant you would require some other evidence in the way of voucher to show that payment had actually been made, wouldn't you?

A. Not necessarily.

Q. Or by checking it with the cash account.

A. Well, yes, check with the cash account.

Mr. MONTGOMERY.—I may possibly be to blame in this matter myself. I am perfectly willing to produce the original voucher.

Mr. SMITH.—All we want to get at, Mr. Montgomery, is the truth. I know that some has been paid.

Mr. HARDY.—I know they didn't get the money.

Mr. MONTGOMERY.—I don't want to be placed in the position of offering something not true. I would like permission to produce that voucher.

Mr. SMITH.—If you have the original voucher and will make a copy and certify it and file with the clerk, that will be [220] satisfactory. All we want is the truth.

Mr. MONTGOMERY.—I don't want to be placed in the position of having produced something not true.

(Testimony of George W. Alling.)

Mr. HARDY.—No, we don't construct that.

A. Winchell & Hathaway may have received the credit due them subsequent to the time that that payment was made. You see these accounts were figured periodically and settled up. That was supposed to be a complete settlement up to that time.

Mr. HARDY.—Then, if there was any check No. 7416 you can easily produce the check, can't you?

A. Yes.

Q. Well, that is all we want. Just one other question: Do you know whether all of the cars that were paid for by Winchell & Hathaway to the Ford Motor Car Company were afterwards replevined, taken away by the Ford Motor Car Company, are included in your computation of the number of cars?

A. I think they are not.

Q. They are not?

A. As far as my knowledge. I had no personal knowledge of this case at the time.

Witness excused.

Plaintiff rests.

COURT.—How many cars were included in that replevin action?

Mr. SMITH.—36 touring cars; four sedans, as I remember,—35 touring cars and one sedan. [221]

In the District Court of the United States for the District of Oregon.

No. 2932.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY et al.,
Defendants.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, Mary E. Bell, hereby certify that I acted as official stenographer in the above-entitled case, and that the foregoing is a full, true and correct transcript of my notes taken in the above-entitled case, as I verily believe.

MARY E. BELL. [222]

WHEREFORE, the defendants pray that said stenographic notes, together with the exhibits, be settled as the statement of the case herein.

Dated this 4th day of December, 1919.

ISHAM N. SMITH,
Attorney for Appellants.

Service accepted by copy of stenographic notes; and copy of exhibits is waived.

Dated this 4th day of December, 1919.

HUGH MONTGOMERY,
PLATT & PLATT,
Attorneys for Plaintiff. [223]

In the District Court of the United States for the District of Oregon.

No. 2932.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Defendants.

Stipulation of Correctness of Stenographer's Transcript.

It is hereby stipulated and agreed that the annexed statement of evidence and exhibits, consisting of 1 volume of evidence from page 1 to page 29, inclusive, and of the exhibits designated hereinbefore numbered plaintiffs from 1 to 3 and a check, and Defendant's Exhibits "A" to "E," may by the Court be settled, allowed and approved as correct.

It is further stipulated that the records and files of the United States Circuit Court of Appeals for the Ninth Circuit, which were introduced in evidence at the trial of the above cause as exhibits, may be certified to the Circuit Court of Appeals in their

original form and need not be printed in the printed transcript.

It is further stipulated that all of the records and exhibits introduced in evidence at the trial of the above cause, all of which are on file herein, may be settled and allowed as part of the statement and record on appeal.

Dated this 4th day of December, 1919.

HUGH MONTGOMERY,
PLATT & PLATT,
Attorneys for Plaintiff.
ISHAM N. SMITH,
Attorney for Defendants. [224]

AND AFTERWARDS, to wit, on the 4th day of December, 1919, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

No. 7768.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly

Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above Court:

Please prepare and certify for the appeal of defendants herein to the Circuit Court of Appeals of the United States for the Ninth Circuit, copies of the following:

1. Plaintiff's original bill of complaint.
2. The original injunction and notice of hearing of injunction *pendente lite.*
3. The documents used by both plaintiff and defendants at such hearing and the order of the Court thereon.

3½. Order dissolving said injunction made at the hearing.

4. The amended bill of complaint of plaintiff.
5. The motion directed against the amended complaint.
6. The amended answer of defendants to said amended bill of complaint.
7. The reply of plaintiff to the affirmative matter of said answer.
8. Stipulation concerning statement of evidence.
9. Statement of evidence as settled and signed by the Court.
10. Opinion or decision of the court, if any.
11. All exhibits introduced at the trial of said cause.
12. Decree of the Court.

13. Motion for rehearing and rearguing, also objections to decree. [226]
14. Order on such motion.
15. Petition for appeal and citation on appeal.
16. Order allowing appeal.
17. Assignments of errors.
18. Appeal bond.
19. This praecipe.
20. Citation showing service and return.
21. Stipulation that exhibits may be certified and especially that the printed exhibits on the original plea may be certified without printing in this record.
22. Certificate of the clerk.

ISHAM M. SMITH,
Attorney for Defendants and Appellants.

[Endorsed]: Filed Dec. 4, 1919. G. H. Marsh, Clerk. [227]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, pursuant to the order allowing the appeal in the within-entitled cause, do hereby certify that the foregoing pages numbered from 3 to 227, inclusive, constitute the transcript of record upon appeal in the case in which Ford Motor Company, a corporation, is plaintiff and appellee, and F. M. Hathaway and Fannie S. Winchell, as administratrix of the estate of V. W.

Winchell, deceased, and F. M. Hathaway, as administrator of the partnership estate of V. W. Winchell and F. M. Hathaway, copartners, formerly doing business under the firm name and style of Eugene Ford Auto Company, are defendants and appellants; that the said transcript of record has been prepared by me in accordance with the praecipe of the appellants filed in said cause, and that the same is a full, true, and complete transcript of the record and proceedings had in said court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is $71.85, and that the same has been paid by the said appellants.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed at Portland, in said district, this 31st day of December, 1919.

[Seal] G. H. MARSH,
Clerk. [228]

[Endorsed]: No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. F. M. Hathaway and Fannie S. Winchell, as Administratrix of the Estate of V. W. Winchell, Deceased, and F. M. Hathaway, as Administrator of the Partnership Estate of V. W. Winchell and F. M. Hathaway, Copartners, Formerly Doing Business Under the Firm Name and Style of Eugene Ford Auto Company, Appellants, vs. Ford Motor Company, a Cor-

poration, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed January 2, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

FORD MOTOR COMPANY, a Corporation,
Appellee,

vs.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,
Appellants.

Appellants' Designation of Record to be Printed in the Transcript.

To the Honorable FRANK D. MONCKTON, Clerk of the Above Court:

The appellants above named designate and specify the following portions of the record in the above cause to be printed in the transcript:

It will be noted that this request for printing relates to two different cases, to wit:

1. The above cause.

2. The transcript and briefs in case number 2963, on file in this court, said case number 2963, being between the same parties to this case, and which is the original replevin case out of which this present suit arises.

The record in each case designated to be printed in the transcript herein is referred to in the particular case to which said record relates.

RECORDS IN THE ABOVE CASE.

From the records in the above case, the appellants designate the following documents for printing in the transcript:

1. Original bill of complaint, filed February 25, 1918.

2. Motion for order to show cause and restraining order, filed February 25, 1918.

3. Order to show cause, filed February 25, 1918.

4. Answer, affidavit of Luke L. Goodrich, and motion and showing upon restraining order, filed March 16, 1918.

This request does not include the printing of the

entire record of the case No. 2963, which, however, was used at said motion.

5. Order allowing motion to dissolve, order to show cause, and denying application for temporary injunction, filed March 25, 1918.

6. Amended complaint, filed April 2, 1918.

7. Motion to strike amended complaint, filed September 13, 1918.

8. Order overruling motion to dismiss and allowing defendant ninety days to answer, filed September 30, 1918.

9. Answer, filed January 24, 1919.

10. Reply, filed July 18, 1919.

11. Decree, rendered and entered July 28, 1919.

12. Certified copies of four chattel mortgages introduced as exhibits, filed July 26, 1919.

13. Motion for rehearing and reargument, filed August 4, 1919.

14. Order denying the same, filed October 6, 1919.

15. Plaintiff's Exhibit 1, being Defendants' Exhibit "E."

16. Seven invoices of Ford Motor Company, with sight draft attached.

17. Four invoices of Ford Motor Company, with sight draft attached. (The above invoices with sight draft were introduced as exhibits.)

18. Petition for appeal.

19. Assignment of error accompanying the same.

20. Order allowing appeal and fixing bond.

21. Citation on appeal.

22. Oral testimony taken by the stenographer and allowed *in extenso,* as statement of the case.

23. Stipulation agreeing to settlement of stenographer's transcript as statement of the case.

FROM CASE No. 2963, THE REPLEVIN CASE BETWEEN THE SAME PARTIES.

All references are to the printed records in said case, which were introduced in evidence in the above cause as Plaintiff's Exhibit 3, and Defendants' Exhibit "E."

1. Amended complaint, Plaintiff's Exhibit 3, pages 5 to 8 inclusive.

2. Answer thereto, Plaintiff's Exhibit 3, pages 9 to 15.

3. Reply, Plaintiff's Exhibit 3, pages 15 to 17.

4. Verdict and judgment, Plaintiff's Exhibit 3, pages 17 to 20.

5. Petition for new trial, Plaintiff's Exhibit 3, pages 20 to 25.

6. Petition for new trial or modification of judgment, Plaintiff's Exhibit 3, pages 126 to 130.

7. Order denying new trial, Plaintiff's Exhibit 3, pages 25 to 26.

8. The following proceedings shown in Plaintiff's Exhibit 3:

Print in full Ford Motor Company's assignment of error number 6, pages 37 and 38, and assignment of error number 12, pages 42 and 43.

From Ford Motor Company's bill of exceptions, to wit: Exception number 11, subdivision B, set out at pages 108, 109, 110 and 111, down to but not including the expression "after the close of all of the evidence introduced upon the trial of the above-entitled cause," etc.

9. The following proceedings at page 175, Plaintiff's Exhibit 3:

Q. What was done with this $16,077.50?

A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified through my office at Portland—

Mr. SMITH.—Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

The COURT.—I don't think it is material what became of the sixteen thousand?

Mr. SMITH.—As long as he didn't pay it to us, that is all there is to it.

COURT.—As long as it didn't get to the defendants.

10. Print in full the cross-examination, redirect examination and recross examination of witness McNamara, pages 189 to 199, Plaintiff's Exhibit 3, also the direct examination and cross-examination of witness F. B. Norman, recalled for plaintiff, pages 199 to 205.

11. Print the following testimony from the direct examination of F. M. Hathaway, Plaintiff's Exhibit 3, pages 260 and 261:

Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus, just as if you passed them out to the public, do they? A. Yes, sir.

Q. That is they were sold as far as the Ford Motor Car Company is concerned?

A. That is the way.

Q. And fully paid for, as far as you are concerned? A. Yes, sir.

Q. And if you don't sell them again yourself, that is your loss, is it?

A. They remain our property.

Q. In all the three years you dealt with them—

JUROR.—I would like to ask if they have to sign a contract each year for these cars?

A. Yes, sir.

JUROR.—The same old contract or a new form of contract?

A. Why, it is changed a little; it seems to be about the same thing.

Q. Have you ever read through and studied the language, and know the meaning of all the fine print in it? A. No, sir.

Q. These forty-eight odd paragraphs?

A. No.

Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery, to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like?

A. Yes, sir.

Q. You have done that for three years?

A. Four years I was with the Ford Motor Company?

Q. You were their agent over in Eastern Oregon? A. Yes, sir.

Q. Were you ever called upon to pay any any further price than the price you pay on delivery? A. No, sir.

Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing.

12. From the testimony of V. W. Winchell, begin with the following question on page 223:

Q. You can look at the invoice and refresh your memory as to the exact amount paid.

Down to and including the following question and answer on page 227:

Q. Nothing whatever, in any way, shape or form?

A. No, sir.

13. From the testimony of V. W. Winchell, Plaintiff's Exhibit 3, pages 231–232, print the following:

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene and paid some debt of yours there. Did you ever authorize any one to do that?

A. No, sir I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed? A. Yes, sir.

14. From the testimony of F. M. Hathaway, on direct examination, Plaintiff's Exhibit 3, pages 253 and 254, print the following:

Q. What was the total you had paid for the cars?

A. I couldn't say the exact amount, but around sixteen thousand.

Q. $16,077.50? A. Yes, sir.

Q. The amount you had actually paid for the cars? A. Yes, sir.

Q. State to the jury whether or not there was any further sum to be paid by you?

A. No, sir.

Q. Then when you sold the cars you got your profit? A. Yes, sir.

Q. And if you didn't sell them you didn't get the profit. Is that right?

A. They remained ours.

15. From the testimony of witness F. B. Norman, recalled in rebuttal, and on cross-examination, at page 295:

Q. Well, you got your money out of it, didn't you? A. Yes, sir.

Q. And you made the cars to sell?

A. Yes, sir.

Q. And you shipped them to them to sell?

A. Yes, sir.

Q. And they were selling your cars only? Everything they sold were Ford cars?

A. Yes, sir.

16. From the testimony of V. W. Winchell, Plaintiff's Exhibit 3, pages 233 and 234, print the following:

Q. And the 5% bonus on the amount of thirty-six touring cars at $493.25, and the Sedan at $983.25?

A. Yes, less a partial payment probably six months ago, some time ago, on this bonus money.

Q. That is six months ago you received some bonus money? A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

Respectfully submitted,
ISHAM N. SMITH,
Attorney for Appellants.

[Endorsed]: No. 3436. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ford Motor Company, a Corporation, Appellee, vs. F. M. Hathaway et al., Appellants. Appellants' Designation of Record to be Printed in the Transcript. Filed Jan. 8, 1920. F. D. Monckton, Clerk.

Plaintiff's Exhibit—Check.

FORD
Universal Car

FORD
Universal Car

FORD MOTOR COMPANY
BRANCH ACCOUNT

Portland, Oregon, Apr. 11, 1916. 191—
7416
No. ~~5816~~

Pay to the order of Eugene Ford Auto Co. $987.48
Nine hundred eighty-seven and 48/100 Dollars.

In settlement of account as stated on the back of this check.

FORD MOTOR COMPANY.
W. S. McNAMARA,
~~Local Manager~~
~~Cashier~~
Chief Clerk.

Lumbermans National Bank, Portland, Oregon.
Ent'd C. R. 62.
Audited E. P. J.
[Stamped across face:] MAIL. R.
[On reverse side:]

Endorsement of this check is sufficient acknowledgment of payment in full of the following account with the Ford Motor Company.

3% on business. 3296. Volume 1915, 1916. 987.48.

Pay to the order of any bank, banker or Trust Co. all prior endorsements guaranteed.

Apr. 14, 1916. The First National Bank. 96–17.

Eugene, Oregon. 96–17. Luke L. Goodrich, Cashier.
No receipt necessary.

EUGENE FORD AUTO CO.
By J. M. HATHAWAY.

[Endorsed]: No. E.–7768. Ford Motor Company vs. V. W. Winchell et al. Original Plaintiff's Exhibit—Check not Marked. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed Jul. 31, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 7, 1920. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 1.

[TELEGRAM.]

Portland, Oregon, May 24, 1916. 191—.

To Eugene Ford Auto Company,
Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers who will open a Branch at Eugene.

FORD MOTOR COMPANY.

FBN.

Telephoned 9:50. E. M.

Defendant's Exhibit "E."

[Endorsed]: E.–7768. Ford Motor Company vs. V. W. Winchell et al. Original Plaintiff's Exhibit 1. G. H. Marsh, Clerk.

U. S. District Court. Filed Sep. 6, 1916. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed Jul. 31, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 7, 1920. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 3.

AMENDED COMPLAINT.

Plaintiff complains and for cause of actions, alleges:

I.

That it is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and principal place of business at Highland Park, Michigan, and duly authorized to transact business as a foreign corporation in the State of Oregon, with a factory branch and principal place of business in the State of Oregon in Portland, Multnomah County Oregon.

II.

That E. A. Farrington and L. A. Houck are copartners doing business under the firm name and style of Pacific Transfer Company, and are engaged in the warehouse and transfer business in the City of Eugene, Oregon.

III.

That H. Sandgathe is an individual doing business as the Springfield Garage, and is in the automobile business at Springfield, Oregon.

IV.

That V. W. Winchell and F. M. Hathaway are copartners, doing business as the Eugene Ford Auto

Company, and are in the automobile business at Eugene, Oregon.

V.

That A. Wilhelm and John Doe Wilhelm are co-partners doing business as A. Wilhelm & Son, and are in the automobile business at Junction City, Oregon.

VI.

That heretofore and on or about September 10th, 1915, plaintiff and defendants V. W. Winchell and F. M. Hathaway entered into a contract whereby said defendants were to represent the plaintiff as limited agents. Pursuant to said contract plaintiff consigned to the said defendants in this paragraph mentioned the following numbered Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066343, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067615, Sedan 658934, 1116486.

VII.

That thereafter plaintiff pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly cancelled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above-mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the

time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of thirty-four hundred and one and 12-100 dollars ($3401.12), which amount is the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings the said sum of thirty-four hundred and one and 12-100 dollars into this court in this action, ready to be paid to defendants.

VIII.

That the amount involved in this action is in excess of three thousand dollars, and within the jurisdiction of this Court.

IX.

That at the time of the commencement of this action said automobiles above described are within the State of Oregon and the jurisdiction of this Court, and in the possession of the defendants herein; that the plaintiff is the present owner and entitled to the immediate possession of said automobiles; that demand has been made upon the defendants for the possession of said automobiles and defendants have refused to give plaintiff possession of said automobiles.

X.

That said automobiles are of the value of sixteen thousand seventy-seven and 50-100 dollars ($16,077.50).

Wherefore plaintiff demands judgment against the defendants for the recovery of Ford automobiles as particularly set forth in Paragraph VI of this

complaint, or for $16,077.50, the value thereof; $1,000.00 damages for the detention thereof; and for the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the plaintiff's attorney in the above-entitled action, and that the foregoing proposed amended answer is true as I verily believe; that I make this verification because the attorney-in-fact is without the state and I am acquainted with the facts.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 14th day of August, 1916.

[Seal] (Sgd.) HOMER T. SHAVER,
Notary Public for Oregon.

My commission expires July 19, 1920.

Filed August 14th, 1916. G. H. Marsh, Clerk.

And on the 14th day of June, 1916, there was duly filed in said Court an Answer, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

E. A. FARRINGTON and L. A. HOUCK, Copartners Doing Business Under the Name and Style of PACIFIC TRANSFER COMPANY; J. DANIELS, H. SANDGATHE, Doing Business as SPRINGFIELD GARAGE; V. W. WINCHELL and F. M. HATHAWAY, Copartners Doing Business Under the Name and Style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, Copartners, Doing Business Under the Firm Name and Style of A. WILHELM & SON,
Defendants.

Come now the defendants and answering the complaint herein admit the allegations contained in Paragraph I, in Paragraph II, in Paragraph III, in Paragraph IV, and in Paragraph V of the Complaint herein.

Deny each and every other allegation contained in said complaint except as hereinafter expressly admitted, and except as hereinafter alleged.

For a further and separate answer and defense to said complaint these defendants allege that V. W. Winchell and F. M. Hathaway prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff, and no further payments were to be made thereon; and, thereupon, the plaintiff delivered said automobiles to defendants and title to the same passed from plaintiff to defendants, and defendants became the owners thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and are now, the owners thereof, and entitled to the immediate and exclusive possession of the said automobiles.

For a further and separate answer and defense to said complaint, the defendants V. W. Winchell and F. M. Hathaway reallege all of the allegations contained in the first separate answer contained therein, and these defendants further allege that ever since the contract mentioned in the complaint was made between plaintiff and these defendants, plaintiff has dealt with these defendants in the sale of automobiles, so that when the defendants paid to plaintiff the amount required to take up the bill of lading sent for collection by the plaintiff with the automobiles delivered by plaintiff to defendants, and paid the freight and draft attached to such bill of lading, delivery was made of said automobiles to defendants and such drafts were drawn by plaintiff against defendants for the full sum required to be paid by de-

fendants to plaintiff as the purchase price of said automobiles, and upon such payment and delivery plaintiffs have received said automobiles and dealt with the same as their own, with the knowledge and acquiescence of plaintiff; and the contract between plaintiff and defendants ever since the same was made has been construed by the parties, the same being the contract under which plaintiff sold and defendants purchased the said automobiles, so that upon payment of such sight drafts and the delivery of the automobiles upon the payment of the same and the freight, title and delivery to such automobiles was completed and passed from plaintiff to defendants and that all of the automobiles mentioned in the complaint were purchased from plaintiff and paid for by defendants upon the terms hereinafter set forth; and long prior to the institution of this action, and not otherwise; and that at the time of the commencement of this action and for a long time prior thereto defendants were and are the exclusive owners of said automobiles and each one of the same and entitled to the immediate and exclusive possession thereof, and were in the lawful possession thereof at the time of the commencement of this action.

For a third further and separate answer and defense these defendants allege the truth to be: That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plaintiff and defendants adjudged their mutual

accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defendants V. W. Winchell and F. M. Hathaway all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof.

For a fourth further and separate answer and defense and counterclaim the defendants V. W. Winchell and F. M. Hathaway allege that during all the time mentioned herein they were, and are now, copartners doing business under the firm name and style of Eugene Ford Auto Company, and had duly registered their assumed business name with the County Clerk of Lane County, Oregon, and were engaged in a general automobile business in Lane County, Oregon, and engaged in buying and selling Ford automobiles, parts, fixtures, accessories, supplies and materials used in said business and incident thereto.

That at the time of the commencement of this action these defendants were, and are now, the owners of the Ford automobiles mentioned in the complaint and being automobiles numbered and specifically designated in Paragraph VI of the complaint, and being Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062232, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359,

1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

That said automobiles were and are of the value of $493.25 for each of said cars, except for the Sedan which was and is of the value of $798.25.

That defendants at the time of the commencement of this action, as such owners of said automobiles, were entitled to the immediate and exclusive possession of the same; and on or about Monday, the 5th day of June, 1916, the plaintiff instituted the above cause and wrongfully and unlawfully and maliciously caused the Writ of Replevin to be issued out of this court and filed an affidavit and bond thereon and demanded immediate possession of the said automobiles; and at the said time the plaintiff well knew that said automobiles, and each and everyone thereof, were the exclusive property of these answering defendants, V. W. Winchell and F. M. Hathaway; and that said defendants were entitled to the immediate and exclusive possession thereof, and plaintiff caused said Writ of Replevin to be issued herein and the said automobiles to be seized maliciously, wrongfully and unlawfully for the purpose of destroying the business of these defendants and injuring their financial standing and credit and depriving them of said property of the value of $18,555.25, as aforesaid, and to drive them out of business and to prevent them from conducting their automobile and garage business hereinbefore described.

That at said time these defendants had an established business in dealing in automobile accessories, appurtenances and supplies from which they were

then making and had been making for several months last past a regular profit of approximately Three Hundred Dollars per month.

That by the wrongful acts of the plaintiff, as herein alleged, the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of Twenty-five Thousand Dollars, in addition to the general damages hereinbefore set forth, to wit: value of the automobiles and the property aggregating $18,555.25.

That the plaintiff is a corporation of great wealth and extensive business associations and power in the commercial world, and in committing the acts herein set forth, it has used its wealth, standing and power to harass and annoy these defendants by the issuance of legal process to which plaintiff knew it was not entitled.

WHEREFORE, defendants demand judgment that the defendants V. W. Winchell and F. M. Hathaway have judgment against the plaintiff for the recovery of the Ford automobiles, as particularly set forth in the answer herein, or for $18,555.25, the value thereof; and for Twenty-five Thousand Dollars damages; and for their costs and disbursements in this action.

I. N. SMITH,
L. BILYEU and
THOMPSON & HARDY,
Attorneys for Defendants.

State of Oregon,
County of Lane,—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action; and that the foregoing answer is true as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 13th day of June, 1916.

[Notarial Seal]

HELMUS W. THOMPSON,
Notary Public for the State of Oregon.

My commission expires March 27, 1917.

Filed June 14, 1916.

G. H. MARSH,
Clerk.

And on the 28th day of July, 1916, there was duly filed in said court a Reply to the Answer, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

E. A. FARRINGTON, and L. A. HOUCK, Copartners, Doing Business Under the Name and Style of PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, Doing Business as SPRINGFIELD GAR-

AGE, V. W. WINCHELL and F. M. HATHAWAY, Copartners, Doing Business Under the Name and Style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, Copartners, Doing Business under the Firm Name and Style of A. WILHELM & SON,

Defendants.

Comes now the plaintiff, Ford Motor Company, a corporation, and for reply to the first further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the second further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the third further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the fourth further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

WHEREFORE, plaintiff having fully replied to the further and separate answers and defenses of the

defendants, prays judgment as heretofore asked for in the complaint on file herein.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the attorney for plaintiff corporation in the above entitled action, that the foregoing reply is true as I verily believe. I further state that I have personal knowledge of the facts herein contained and verify this reply for the reason that the proper officer for service of this corporation is not now within the state.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 28th day of July, 1916.

[Seal] (Sgd.) F. C. McDOUGAL,
Notary Public for Oregon.

My commission expires July 1, 1920.

AND AFTERWARDS, to wit: On the 6th day of September, 1916, there was duly filed in said court a verdict in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

FORD MOTOR CAR COMPANY, a Corporation,
Plaintiff,

vs.

E. A. FARRINGTON, and L. A. HOUCK, Copartners, as PACIFIC TRANSFER COMPANY,

J. DANIELS, H. SANDGATHE, V. W. WINCHELL and F. M. HATHAWAY, Copartners as EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, Copartners, as A. WILHELM & SON,

Defendants.

We, the jury, duly empanelled and sworn to try the above cause, find our verdict for the defendants; and, that the defendants, V. W. Winchell and F. M. Hathaway, copartners doing business as Eugene Ford Auto Company, were at the time this action was commenced and are now entitled to the immediate possession and are entitled to the return of the Ford automobiles described in the complaint and the answer herein and being the following numbered Ford automobiles, to wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062280, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, sedan 658934, 1116486, and in case a return cannot be had we find the value of the said automobiles to be $16,077.50, and single damages sustained by the defendants, V. W. Winchell and F. M. Hathaway, partners as aforesaid, to be the sum of $6,000.00.

GEORGE KEECH,
Foreman.

AND AFTERWARDS, to wit, on Monday, the 11th day of September, 1916, the same being the

60th judicial day of the regular July term of said court; present: the Honorable R. S. BEAN, United States District Judge, Presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

Thereupon, on motion of said defendants for judgment on the verdict heretofore filed and entered herein,

IT IS CONSIDERED, that said defendants, V. W. Winchell and F. M. Hathaway, copartners doing business as the Eugene Ford Auto Company, do have and recover of and from the plaintiff, Ford Motor Car Company, a corporation, the immediate possession and return of the Ford automobiles described in the complaint and answer herein, and being the following numbered Ford automobiles, to wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, sedan 658934, 1116486.

AND IT IS FURTHER ORDERED that in case return of said automobiles cannot be had that said defendants, V. W. Winchell and F. M. Hathaway, copartners, doing business as the Eugene Ford Auto Company, do have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, the sum of $16,077.50, the value of the said automobiles, and

IT IS FURTHER CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, copartners, doing business as the Eugene Ford Auto Company, have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, damages in the sum of $6,000.00, together with costs and disbursements herein taxed at $68.55.

Whereupon, on motion of said plaintiff,

IT IS ORDERED that it be and it is hereby allowed thirty days from this date within which to file a motion to set aside said judgment and for a new trial herein, and in which to submit a Bill of Exceptions, and

IT IS FURTHER ORDERED that issuance of execution upon the said judgment be stayed until after the termination of the said motion for new trial.

R. S. BEAN,
United States District Judge.

Filed September 11, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 8th day of November, 1916, there was duly filed in said court a petition for new trial in words and figures, as follows, to wit:

In the District Court of the United States for the District of Oregon.

FORD MOTOR COMPANY, a Corporation,
Plaintiff,

vs.

E. A. FARRINGTON, V. W. WINCHELL and F. M. HATHAWAY et al.,
Defendants.

COMES NOW the plaintiff in the above entitled action appearing by Messrs. Platt & Platt and E. L. McDougall, its attorneys of record, and petitions the Court for a new trial in the above entitled action and for grounds of such petition alleges:—

I.

That it appears from the undisputed testimony introduced upon the trial of the above entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants, V. W. Winchell and F. M. Hathaway, aggregating the sum of $12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the Court failed and refused to instruct the jury at the trial of the above entitled action that the plaintiff was entitled to offset the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above entitled action upon the further ground that the verdict of the jury made and entered in the above entitled action, and the judgment entered thereon contravenes the instructions given by the Court upon the

trial of the above entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of $16.077.50, and said judgment is contrary to the evidence introduced upon the trial of the above entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above entitled cause and the law applicable to the facts proven as evidenced by the instructions of the Court made upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim for damages for the sum of $6,000, or any sum in excess of $2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

IV.

Plaintiff further petitions the Court for an order modifying the judgment entered in the above entitled cause on the .. day of September, 1916, by offsetting against the sum of $16,077.50 therein awarded to the defendants in lieu of the machines sought to be replevied in the above entitled action the sum of $12,676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to the First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevied in the above entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of $2800 bearing date April 22d, 1916; the second note being in the sum of $2800 bearing date of May 1st, 1916, and the third note being in the sum of $8,400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevied in the above entitled

action, in order to free the property involved in the above entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this Court modifying the judgment heretofore entered in the above entitled cause on the —— day of September, 1916, by striking therefrom the sum of $6,000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because, it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants, V. W. Winchell and F. M. Hathaway, and that no evidence was issued upon the trial of the above entitled cause upon which any claim or judgment for damages in the sum of $6,000 could properly be based, and that such allowance of $6,000 for damages, or any other sum in excess of $2,414.75 is in contravention of the instructions of the Court directing the jury that they should not allow the value of the ma-

chines in controversy, and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendant's contract with the plaintiff in the above entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff.

Filed 8th day of November, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on Tuesday the 2d day of January, 1917, the same being the 49th judicial day of the regular November term of said court, present: the Honorable R. S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard upon motion of the plaintiff for new trial herein, and for an order modifying the judgment heretofore entered in this cause, and was argued by Mr. Hugh Montgomery of counsel for plaintiff, and by Chas. H. Hardy of counsel for said defendants, on consideration whereof

IT IS ORDERED AND ADJUDGED that each of said motions be and the same is hereby denied, and on motion of said plaintiff

IT IS FURTHER ORDERED that said plaintiff be and it is hereby allowed ten days from this date within which to submit a Bill of Exceptions herein.

Filed January 2d, 1917.

G. H. MARSH,
Clerk.

ASSIGNMENT OF ERRORS.

VI.

The above entitled court erred in sustaining the defendants' motion to take from the consideration of the jury all of the evidence offered by the plaintiff as to the payment to The First National Bank, of Eugene, Oregon, of the amount of certain liens imposed upon the automobiles in controversy by the defendants in favor of the said First National Bank, of Eugene, Oregon, and in refusing to instruct the jury that the plaintiff was entitled to an offset against any claim of the defendants in the amount of money paid to the said First National Bank of Eugene, Oregon, to remove the liens imposed upon the automobiles in controversy by the defendants in the above entitled action.

* * * * * * * * *

XII.

The above entitled court erred in overruling and not sustaining plaintiff's motion for a modification of the judgment entered in the above entitled action by which motion the plaintiff requested the court to offset against the judgment entered in the above entitled cause the sum of $12,676.38, being the amount of money paid by the plaintiff to the First National Bank, of Eugene, Oregon, for the benefit of defend-

ants, in payment and discharge of the liens imposed by the defendant upon the automobiles in controversy, and to further modify said judgment by eliminating therefrom the $6,000.00 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles, because no evidence was introduced upon the trial of said cause showing that the defendants had been specially damaged in the sum of $6,000.00, or any sum, and for the further reason that the plaintiff had a legal right to, and did, terminate its contract with the defendants, and that the undisputed evidence established that the defendants V. W. Winchell and F. M. Hathaway had sold their business to a third party prior to the cancellation of the contract with the Plaintiff.

BILL OF EXCEPTIONS.

EXCEPTION XI, SUBDIVISION B.

"I instruct you that the defendants have failed to prove damages in this case and that the only question for you to decide is who are the owners and entitled to the possession of the automobiles in question and their value."

To the action of the Court in refusing to give plaintiff's requested instruction B, plaintiff duly excepted, which exception was allowed.

F. B. Norman, a witness called on behalf of the plaintiff, testified as follows:

Q. What became of this $12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

A. That was paid to the bank on mortgages they had given for these cars.

Mr. SMITH.—We move to strike that out if the Court please. There was no payment before this action was begun at all, and no payment to us, or for us, or with our authority, to anybody.

COURT.—They will have to show that was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Car Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

Mr. SMITH.—Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT.—I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

Mr. SMITH.—They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

F. B. Norman, the said witness, on behalf of the plaintiff, further testified as follows upon cross-examination:

Q. At what date do you claim you gave the First

National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now. It was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank, either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you? A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after that action was begun, but after the answer was filed? A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National Bank at Eugene. Don't you know, as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so, I wouldn't say.

V. W. Winchell, a witness called on behalf of the defendants, testified as follows:

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National

Bank of Eugene and paid some debts of yours there. Did you ever authorize any one to do that?

A. No, sir. I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed? A. Yes, sir.

Thereupon the defendants made the following motion:

Mr. SMITH.—There are two or three motions in relation to the record we want to make to keep the record straight on the evidence. We first move to strike from the consideration of the jury all evidence offered on behalf of the plaintiff as to the payment of the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

And thereupon the Court made the following ruling:

COURT.—I think that is well taken as far as constitutes any defense in this case.

To the action of the Court in taking from the consideration of the jury the claim of the plaintiff for the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, the amount of the lien imposed upon the automobiles in controversy by the defendants, the plaintiff duly excepted, which exception was duly allowed.

PETITION FOR NEW TRIAL OR MODIFICATION OF JUDGMENT.

Comes now the plaintiff in the above-entitled action appearing by Messrs. Platt & Platt and E. L. McDougal, its attorneys of record, and petitions the Court for a new trial in the above-entitled action and for grounds of such petition alleges:

I.

That it appears from the undisputed testimony introduced upon the trial of the above-entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants V. W. Winchell and F. M. Hathaway, aggregating the sum of $12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above-entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the Court failed and refused to instruct the jury at the trial of the above-entitled action that the plaintiff was entitled to offset the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above-entitled action upon the further ground that the verdict of the jury made and entered in the above-entitled action and the judgment entered thereon contravenes

the instructions given by the Court upon the trial of the above-entitled cause, in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of $16,077.50, and said judgment is contrary to the evidence introduced upon the trial of the above-entitled cause, in that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause and the law applicable to the facts proven as evidenced by the instructions of the Court made upon the trial of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above-entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above-entitled cause upon which any claim for damages for the sum of $6,000, or any sum in excess of $2,414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above-entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above-entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above-entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above-entitled cause.

IV.

Plaintiff further petitions the Court for an order modifying the judgment entered in the above-entitled cause on the 11th day of September, 1916, by off-setting against the sum of $16,077.50, therein awarded to the defendants in lieu of the machines sought to be replevined in the above-entitled action the sum of $12,676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to The First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevined in the above-entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above-entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of $2,800, bearing date April 22d, 1916, the second note being in the sum of $2,800, bearing date May 1st, 1916, and the third note being in the sum of $8,400, bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevined in the above-entitled action, in order to free

the property involved in the above-entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this court modifying the judgment heretofore entered in the above-entitled cause on the 11th day of September, 1916, by striking therefrom the sum of $6,000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above-entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above-entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants V. W. Winchell and F. M. Hathaway, and that no evidence was introduced upon the trial of the above-entitled cause upon which any claim or judgment for damages in the sum of $6,000 could properly be based, and that such allowance of $6,000 for damages, or any other sum in excess of $2,414.75 is in contravention of the instructions of the Court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising

from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above-entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendants' contract with the plaintiff in the above-entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff."

which said petition for a new trial was, after argument by the respective counsel for plaintiff and defendants, and after due consideration by the Court, denied by the said Court on the 2d day of January, 1917, to which ruling the plaintiff then and there excepted, which exception was allowed.

TESTIMONY OF CHARLES E. GODEN.

Q. What was done with this $16,077.50?

A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified, through my office in Portland—

Mr. SMITH.—Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

COURT.—I don't think it is material what became of the sixteen thousand.

Mr. SMITH.—As long as he didn't pay it to us, that is all there is to it.

COURT.—As long as it didn't get to the defendants.

TESTIMONY OF WILLIAM S. McNAMARA.

Cross-examination.

Questions by Mr. HARDY.—You say you are the chief clerk that had charge of the Winchell and Hathaway matters? A. Yes, sir.

Q. Can you identify, then, these invoices and drafts for these automobiles that were invoiced to them, and paid for by them? I will ask you if these were issued out of your office in payment of the automobiles in question, these being the invoices and drafts by which the Ford Motor Car Company received payment?

A. That is the form we used in connection with our business.

Q. And those are the accounts that you had charge of, of course, and you can identify them?

A. Yes, sir.

Mr. HARDY.—We will offer in evidence the invoices and drafts, showing payment for these automobiles.

Mr. McDOUGAL.—No objection.

Mr. HARDY (reading): "Ford Motor Company, sold to Eugene Ford Auto Company, Eugene, Oregon, 8 touring cars, 56 tread, $3520.00; less 15%, $528.00; $2992.00. Prop. freight Detroit to Portland, $335.-00— $3327.54." "Ford Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." "Ford Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." One of these is "Sold Eugene Ford Auto Company, Eugene, Oregon, May 25, 1916, assembly stock; date

shipped May 25, 1916. Terms strictly net cash. One runabout 56" tread, $390.00, less 15%, $58.50, balance $331.50. Retail freight Detroit to Portland, $53.25; 10 gallons gas and 4 quarts oil, $2.35. Total $387.10." This last being a car that was driven up to Eugene, instead of going by freight, and paid for here.

A. That last car in Portland was delivered to a traveling man in Portland for their account, a man by the name of Matthews.

Mr. McDOUGAL.—Was not in this consignment at all.

A. Was not in the carload.

COURT.—One of the cars in controversy; was delivered here to a traveling man in Portland on account of Eugene.

A. No, it was not one of the cars that was replevined.

COURT.—I beg pardon; I thought it was.

Mr. HARDY.—It was simply offered in connection with the statement. This witness testified as to the course of dealing; this witness has testified that he knew about their account, and I offer this for the purpose of showing the course of dealing, and as a part of the cross-examination in connection with the testimony of their witness.

COURT.—I think it is competent for that purpose; I thought it was one of the cars in controversy.

Mr. McDOUGAL.—This is introduced to show custom?

Mr. HARDY.—Goes to show we bought and paid for the cars; that is all it is offered to show.

Mr. McDOUGAL.—We object to its introduction on this.

COURT.—I think it is competent.

Mr. SMITH.—I will ask this witness some questions, with your Honor's permission.

Questions by Mr. SMITH.—Mr. McNamara, I will show you this invoice dated March 13, 1916, and the draft dated March 14, 1916; these two constitute the papers in one transaction, don't they; that is, that draft accompanied the invoice?

A. Accompanied the bill of lading.

Q. Well, that is the draft made on this invoice, then?

A. Well, I couldn't state as to that because it does not give the car number.

Q. How much is the draft for? A. $3327.54.

Q. How many cars in the invoice? A. Eight.

COURT.—You say the draft accompanied the bill of lading. The cars were shipped to these people, bill of lading with draft attached? A. Yes, sir.

COURT.—And you drew on them for the amount and sent it accompanied by bill of lading?

A. Yes, sir.

COURT.—And before they got the cars, they had to pay that draft?

A. Yes, and invoice sent to them for checking record.

Q. This is the invoice that accompanied that draft as a checking measure? A. Yes, sir.

Mr. SMITH.—I ask that the draft and invoice be marked as one exhibit.

Marked DEFENDANTS' EXHIBIT "A."

Ford Ford Motor Company Invoice

Portland

Sold to Eugene Ford Auto Company,
Eugene, Oregon.

Charge same. Order date Mar. 13, 1916.

Terms strictly cash, Norman Assg. stock

Date shipped Mar. 7, 1916.

FARMERS AND MERCHANTS BANK,

Shipped via

8 Touring cars, 56" tread	$3520.00
Less 15%	528.00
	$2992.00
Prop. freight Detroit to Portland	335.54
	$3327.54

Motor Nos.
1067411
1067426
1067396
1067382
1068830
1067377
1068781
1067415

Dated at Portland, Oregon, Mar. 14, 1916.

$3327.54 No. 1822

Ford Ford

At sight, on arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100 Dollars (with exchange)

Value received and charge to the account of S. P. 6686

FORD MOTOR COMPANY,
R. VAN HARRISEEN,
Cashier,

To Eugene Ford Auto Co.,
Eugene, Oregon.
C/o First National Bank.

First National Bank
Paid May 24, 1916
Eugene, Oregon.

Q. Invoice dated April 4, 1916, and draft April 3, 1916, they relate to the same transaction?

A. I couldn't state fully unless I had my records here to tell.

Q. From looking at the records you have that is your best recollection of it, is it not?

A. I should think they were. I could tell positively if I had my draft book.

Q. The draft and invoice are in the same amount and made practically on the same date?

A. They are.

Mr. SMITH.—We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT "B."

Ford Ford Motor Company Invoice

Portland

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Charge same. Order date April 4, 1916.

Terms strictly net cash. Date shipped 4–23–16

Customers order

Contract

Shipped via. S. P. in U. P. 175291

8 Touring cars, 56″ tread	$3520.00
Less 15%	528.00
	2992.00
Prop. freight Detroit to Portland	333.54
	$3327.54

Mot. Nos.
1116510
1067484
1022282
1008770
1116461
1116486
1116479
1116459

Dated at Portland, Oregon, Apr. 3, 1916.

$3327.54 No. 1894

Ford Ford

At sight, on the arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100 Dollars (with exchange)

Value received and charge to the account of

FORD MOTOR COMPANY,

R. VAN HARRISEEN,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank,

Paid May 24, 1916

Eugene, Oregon.

Q. I will now show you invoice dated March 28, 1916, for $3329.87, and draft dated March 29, 1916, for $3329.87. They relate to the same transaction, do they? A. Yes, sir.

Mr. SMITH.—We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT "C."

Ford Ford Motor Company Invoice

Portland

Sold to Eugene Ford Auto Company

Eugene, Oregon. Assg. stock

Charge same. Order date Mar. 28, 1916.

Terms Norman Date shipped Mar. 28, 1916.

First National Bank

Shipped via

8 Touring cars, 56" tread	$3520.00
Less 15%	528.00
	$2992.00
Prop. freight Detroit to Portland	337.87
	$3329.87

1115500
1115957
1115941
1115931 C. I. cover
1115943 "
1115933 "
1116008 "
1115791 "

Dated at Portland, Oregon, March 29, 1916.

$3329.87 No. 1877

Ford Ford

At sight, on the arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-nine and 87/100 Dollars with exchange

Value received and charge to the account of
FORD MOTOR COMPANY,
R. VAN HARRISEEN,
Cashier,

To Eugene Ford Auto Co.,
Eugene, Oregon.
C/o First National Bank.

First National Bank
Paid May 24, 1916
Eugene, Oregon.

Invoice for runabout, May 25, 1916, $387.10, marked

DEFENDANTS' EXHIBIT "D."

Ford Ford Motor Company Invoice
Portland, Ore.

Sold to Eugene Ford Auto Company
Eugene, Oregon.

Order date, May 25, 1916.

Charge same. Assg. stock.
Terms strictly cash. Date shipped May 25, 1916
Norman Shipped via
Customers order
Paid

1 Runabout, 56" tread	$390.00
Less 15%	58.50
	$331.50
Retail freight Detroit to Portland	53.25
10 gal. gas and 4 qts. oil	2.35
	$387.10

1208507

Paid May 25, 1916
Ford Motor Company
Per Van H.

Redirect Examination.

Questions by Mr. McDOUGAL.—How do you account for the fact that the invoices have the word "Sold"?

Mr. SMITH.—Just a moment. That is not ambiguous. The testimony is not admissible unless an ambiguous word. The word "sold" has a definite meaning.

Q. I will withdraw that and put it in this way: Will you explain if any reason why this particular form of invoice was used in this transaction.

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial. The transaction was cash; they paid cash before they took these automobiles out of the car, before they got them in their possession.

COURT.—I think the witness may explain any statement that may be on that invoice; it is not a contract between anybody; it is simply a memorandum. He can explain it, if any mistake about it, I suppose.

A. It is simply a memorandum of shipment, and not to be construed as an invoice, because the cars were shipped on consignment, and at a time last spring when we were short of the regular form of automobile orders, as we call them, and had to use the invoices, parts invoices for shipping sheets for agents, to give them the numbers to check their cars.

Q. In other words, you used this particular form because you were out of the other form which you

customarily used in these transactions?

A. That is it.

Recross-examination.

Questions by Mr. HARDY.—Mr. McNamara, do you mean to say you didn't use this same form for the two years before? What are you going to say when I produce the forms used two years before?

A. I think you will find a great many of them different.

Q. Do you want to be understood before this jury, the reason you used this form was because you were out of the other form, and it is not the same identical form you used during the previous two years, while they were your agents?

A. They are not the form we are using now. I don't know about two years ago.

Q. Please return after lunch. I will have these here and show them to you.

Whereupon proceedings were adjourned until 2 P. M.

Tuesday, September 5, 1916, 2 P. M.

TESTIMONY OF F. B. NORMAN.

F. B. NORMAN, recalled by the plaintiff.

Direct Examination.

Questions by Mr. McDOUGAL.—Mr. Norman, I believe you have already testified that you are the manager, or were the manager at this time, of the Ford Motor Company, here in Portland?

A. Yes, sir.

Q. Will you state what this $16,077.50 that you sent down to Eugene to Mr. Goden was for.

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial, nothing to do with this case; they don't claim they ever tendered it to us except as testified here this morning. That is another matter. Not deposited in court, and not kept good, anyway.

Mr. McDOUGAL.—This is more for the purpose of getting at the value of the cars.

COURT.—Very well; proceed.

A. Refund on cars that had been paid by the Eugene Ford Auto Company.

Q. What do you mean by refund?

A. The money that they had paid to the bank on the cars that they had taken over from the—that we had shipped to them.

Q. Now, it is pleaded in the complaint here that the plaintiff tendered into court and have tendered into court with the clerk, the sum of $3401.12. Will you state to the jury how that amount was arrived at as a refund on these cars.

Mr. SMITH.—Just a moment, if the Court please. I want to correct that question, or statement of facts. That statement is not in the original complaint; the tender was not made with the original complaint; they have filed an amended complaint. If they will change that question, so it will show the amended complaint.

Mr. McDOUGAL.—Change that and put in the word "amended." So the question is correct.

Q. (Read as follows: Now, it is pleaded in the amended complaint here that the plaintiff tendered into court and have tendered into court with the clerk, the sum of $3401.12. Will you state to the

jury how that sum was arrived at as a refund on these cars.)

A. I am not familiar with those figures at this time.

Q. What does this $34401.12 represent?

A. It represents the contract deposit and rebate they have coming on cars over a certain volume of business that they had on straight 15%; we pay a certain rebate, additional rebate, and that is the earned rebate.

Q. What became of this $12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial. Nothing to do with this case, inasmuch as it was not tendered in court here, and was never paid the defendants.

COURT.—I don't suppose it was necessary to tender into court if they offered to repay to the defendants before they undertook to take possession.

Mr. McDOUGAL.—We want to show why we didn't tender this money into court; it is proper to show at this time.

COURT.—I don't suppose paying into court would make any difference. If I understand that contract you were obliged to refund this money before you took possession of the cars. If you didn't do it, you were not entitled to possession of the cars and you couldn't vest the title in yourself by a tender to the Court later.

Q. (Read.)

A. That was paid to the bank on mortgage they had given for these cars.

Mr. SMITH.—We move to strike that out, if the Court please. There was no payment before this action was begun at all, and no payment to us, or for us, or with our authority, to anybody.

COURT.—They will have to show it was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

Mr. SMITH.—Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT.—I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

Mr. SMITH.—They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

Cross-examination.

Questions by Mr. HARDY.—Mr. Norman, at the time this controversy arose, you were the manager of the Ford Motor Company at Portland?

A. Yes, sir.

Q. And as such had charge of their business in the State of Oregon? A. Yes, sir.

Q. You are not the manager for them now?

A. Not at this particular place, no.

Q. Have nothing to do with their business in Oregon, any more? A. No, sir.

Q. At what date do you claim you gave the First National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now; it was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank, either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you?

A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after the action was begun but after the answer was filed? A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National

Bank at Eugene. Don't you know, as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so. I wouldn't say.

Q. Can you say how big a business the Ford Motor Company did last year? A. Not offhand, no.

Q. Isn't it a fact that the Ford Motor Car Company made and sold over a thousand cars a day?

A. I wouldn't say that, no.

Mr. McDOUGAL.—I object to that as improper cross-examination.

Mr. HARDY.—I think that is part of our own case, anyhow.

Mr. McDOUGAL.—Here is that telegram you asked for.

Q. Is this the telegram you sent to Winchell and Hathaway before you sent the registered letter?

A. Yes, sir.

Mr. HARDY.—We offer it in evidence, if your Honor please.

Mr. McDOUGAL.—For what purpose is that offered in evidence? To show cancellation of the contract?

Mr. HARDY.—The purpose it is offered in evidence for is it tends to show your course of conduct towards us. Tends to show malice, too.

Marked Defendants' Exhibit "E," and read as follows:

"Portland, Oregon, May 24, 1916.

Eugene Ford Auto Co.

Eugene, Oregon.

Be advised that your contract is cancelled. The

territory and your stock will be taken over by Vick Brothers who will open a branch at Eugene.

FORD MOTOR COMPANY."

Witness excused.

TESTIMONY OF V. W. WINCHELL.

Q. You can look at the invoice and refresh your memory as to the exact amount paid.

A. $390.00 less 15 per cent plus $53.25 freight; that is the price at Detroit, less our commission plus the freight to Eugene.

Q. Now, was there any further sum for you to pay the Ford Motor Car Company for these cars?

A. No, sir.

Q. And you paid for them at the time they were delivered? A. Yes, sir.

Q. Did you ever pay any other price to the Ford Motor Company than the price you paid upon delivery? A. No, sir.

Q. You were the agents for the Ford Motor Car Company in 1913, handling their cars from 1913 to 1914? A. That is 1913–14.

Q. During that year did you ever send any other money back to the company than you paid when the cars were delivered? A. No, sir.

Q. And you handled Ford cars from 1914–15?

A. Yes.

Q. Did you ever send any money back to the Ford Motor Car Company other than the price you paid upon delivery?

A. No, sir. That is pertaining to cars; outside of parts now.

Q. Yes. From 1915 to 1916 did you ever pay any

further price than the price they were invoiced to you at? A. No, sir.

Q. And you received the cars? A. Yes, sir.

Q. And sold them in the course of business?

A. Yes, sir.

Q. What was your profit per car during the season beginning August 1st, 1915, to August 1st, 1916?

A. Our profit was 15 per cent of the advertised price, at Detroit—advertised by the Ford Motor Car Company, plus a graduated bonus which was very necessary.

Q. You added to the price you paid the Ford Motor Car Company your profit, did you?

A. Yes, sir.

Q. And received that from the customer?

A. Yes, sir.

Q. And kept the money? A. Yes, sir.

Q. And if you didn't sell the car you simply had the car on your hands? A. Yes, sir.

Q. Did the Ford Motor Car Company take them back off you? A. No, sir.

Q. There were thirty-six of these touring cars, were there? A. Yes, sir.

Q. And one Sedan? A. Yes, sir.

Q. What did you pay for the Sedan?

A. Have you the bill there?

Q. I will ask you if the Sedan is invoiced on this paper I now hand you?

A. Yes, there is a carload of six touring cars, 56-inch tread; one Sedan, 56-inch tread; $925.00 for the Sedan, less 15 per cent.

Q. What was the net price to you of the Sedan?

A. $786.00 at Detroit. Now, I can't remember what the freight was.

Q. Plus the freight?

A. Plus the freight, yes, $786.25.

Q. This is the Sedan mentioned here that they took away from you in the replevin action?

A. Yes, sir.

Q. Dated 1915? A. Yes, sir.

Q. And you had had this on hand ever since and been unable to sell it, had you? A. Yes, sir.

Q. What is the fact as to whether in the meantime the Ford Motor Car Company had reduced its retail price on the Sedan?

A. We still owned the Sedan.

Q. Afterwards they reduced the price on them to the public? A. They reduced no price to us.

Q. Have they to the public? A. Yes, they have.

Q. But you were stuck for the same old price?

A. Yes, sir.

Q. And had the car on your hands at the time they took it away from you? A. Yes, sir.

Mr. HARDY.—I will offer this sheet in evidence, showing the Sedan which is in evidence in this case.

Marked Defendants' Exhibit "G" and read as follows:

Ford Motor Company, Portland Branch, 8/27/15.
Sold to Eugene Ford Auto Company,
Eugene, Oregon.

Factory stock.
Date shipped, 8/27/15.
First National Bank.
Terms, net cash.

6 Touring cars, 56-inch tread	$2640.00
1 Sedan, 56-inch tread	925.00
	$3565.00
Less 15 per cent	534.75
	$3030.25
Proportional freight Detroit to Portland	300.17
Speedometers	42.00

658934 Sedan
257276
858647
858893
859655
859662
859665 "

Q. That was paid for, was it? A. Yes, sir.

Q. Now, Mr. Winchell, the pleadings show you had thirty-six touring cars on hand, and one Sedan, at the time the United States Marshal took the cars under writ of replevin?

A. Yes, sir, that is the Sedan that is mentioned there.

Q. Now, you have paid for these cars, it is admitted, a total of $16,077.50. Is that right?

A. Yes, sir.

Q. Was there any further sum remaining to be paid for these cars? A. No, sir.

Q. Nothing whatever in any way, shape or form?

A. No, sir.

* * * * * * *

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene and paid some debt of yours there. Did you ever authorize anyone to do that?

A. No, sir, I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed? A. Yes, sir.

* * * * * * * * *

Q. And the 5% bonus on the amount of thirty-six touring cars at $493.25, and the Sedan at $983.25?

A. Yes, less a partial payment probably six months ago, some time ago, on this bonus money.

Q. That is six months ago you received some bonus money? A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

TESTIMONY OF F. M. HATHAWAY.

Q. What was the total you had paid for the cars?

A. I couldn't say the exact amount, but around sixteen thousand—

Q. $16,077.50? A. Yes, sir.

Q. The amount you had actually paid for the cars?

A. Yes, sir.

Q. State to the jury whether or not there was any further sum to be paid by you? A. No, sir.

Q. Then when you sold the cars you got your profit? A. Yes, sir.

Q. And if you didn't sell them you didn't get the profit. Is that right?

A. They remained ours.

* * * * * * * * *

Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus, just as if you passed them out to the public, do they? A. Yes, sir.

Q. That is they were sold as far as the Ford Motor Car Company is concerned.

A. That is the way.

Q. And fully paid for, as far as you are concerned?

A. Yes, sir.

Q. And if you don't sell them again yourself, that is your loss, is it?

A. They remain our property.

Q. In all the three years you dealt with them—

JUROR.—I would like to ask if they have to sign a contract each year for these cars? A. Yes, sir.

JUROR.—The same old contract or a new form of contract?

A. Why, it is changed a little; it seems to be about the same thing.

Q. Have you ever read through and studied the language, and know the meaning of all the fine print in it? A. No, sir.

Q. These forty-eight odd paragraphs? A. No.

Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery, to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like? A. Yes, sir.

Q. You have done that for three years?

A. Four years I was with the Ford Motor Company.

Q. You were their agent over in Eastern Oregon?

A. Yes, sir.

Q. Were you ever called upon to pay any further price than the price you pay on delivery?

A. No, sir.

Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing.

TESTIMONY OF F. B. NORMAN—(RECALLED IN REBUTTAL—CROSS-EXAMINATION).

Q. Well, you got your money out of it, didn't you?

A. Yes, sir.

Q. And you made the cars to sell?

A. Yes, sir.

Q. And you shipped them to them to sell?

A. Yes, sir.

Q. And they were selling your cars only. Everything they sold were Ford cars? A. Yes, sir.

Defendants' Exhibit "A."

$3327.54 No. 1822

FORD FORD

The Universal Car The Universal Car

Dated at Portland, Ore., Mar. 14, 1916 191—

At Sight, on the Arrival of Goods, Pay to the Order of [Bank] Lumbermens National Bank Thirty-three hundred twenty-seven and 54/100 Dollars

With Exchange

Value received and charge to the account of

FORD MOTOR COMPANY

R. VAN HOOMISSEN,

Cashier

To Eugene Ford Auto Co.

Eugene, Ore.

c/o First National Bank

S. P. 6686

[Stamped across face:] First National Bank, Eugene, Oregon. Paid May 24, 1916.

Lumbermens National Bank, Portland, Oregon, U. S. A. 27911.

[Stamped on reverse side:] Pay to the order of any bank or banker.

Mar. 14, 1916.

LUMBERMENS NATIONAL BANK,

Portland, Oregon.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland

Order Date—Mar. 13, 1916

Assy stock

Date Shipped—Mar. 7–16

Sold to Eugene Ford Auto Company, Eugene, Oregon

Charge—Same

Terms: Strictly Net Cash Shipped via Norman

Customer's Order

Farmers & Merchants Bank

8 Touring car 56″ tread.....	3520.00	
Less 15%	528.00	
	2992.00	
Prop. freight Detroit to Portland	335.54	$3327.54

Motor Nos.

1067411
1067426
1067396
1067382
1068830
1067377
1068781
1067415

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed]: U. S. District Court. Filed Sep. 5, 1916. G. H. Marsh, Clerk District of Oregon.

U. S. District Court, District of Oregon. Filed Jul. 31, 1919. G. H. Marsh, Clerk.

Defendants' Exhibit "B."

Form 180

$3327.54 No. 1894

FORD FORD

The Universal Car. The Universal Car

Dated at Portland, Ore., Apr. 3, 1916. 191—

At Sight, on the Arrival of Goods, Pay to the Order of (Bank) Lumbermens National Bank Thirty-three hundred twenty-seven and 54/100 Dollars

with exchange

Value received and charge to the account of

FORD MOTOR COMPANY

R. VAN HOOMISSEN,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Ore.,

c/o First Nat. Bank

[Stamped across face:] First National Bank, Eugene, Oregon. Paid May 24, 1916.

Lumbermens National Bank, Portland, Oregon, U. S. A. 28493.

[Stamped on reverse side:] Pay to the order of any bank or banker.

Apr. 3, 1916.

LUMBERMENS NATIONAL BANK,
Portland, Oregon.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY
Portland
Order Date—April 4 1916
Date Shipped—3-23-16

Sold to Eugene Ford Auto Company, Eugene, Oregon

Charge—Same

Terms: Strictly Net Cash

Shipped via SP in UP 175291

Customer's Order Contract

8 Touring cars 56″ tread.....	3520.00	
Less 15%	528.00	
	2992.00	
Prop freight Detroit to Portland	335.54	$3327.54

Motor Nos.
1116510
1067484
1062282
1008770
1116461
1116486
1116479
1116459

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed]: U. S. District Court. Filed Sep. 5, 1916. G. H. Marsh, Clerk District of Oregon.

Defendants' Exhibit "C."

Form 180 No. 1175

$3621.08

FORD FORD

The Universal Car. The Universal Car

Dated at Portland, Ore., May 12, 1915. 191

At Sight, on the Arrival of Goods, Pay to the Order of [Bank] Lumbermens National Bank Thirty-six hundred twenty-one and 08/100 Dollars.

With Exchange.

Value received and charge to the account of

FORD MOTOR COMPANY.

R. VAN HOOMISSEN,

Cashier.

To Eugene Ford Auto Co.

Eugene, Or.,

c/o First Natl. Bank.

[Stamped across face:] Paid May 13, 1915. First National Bank, Eugene, Oregon.

[Stamped on reverse side:] Lumbermen's National Bank.

[Endorsed]: E–7768. Ford Motor Company vs. V. W. Winchell et al. Original Defendants' Exhibit "C." G. H. Marsh, Clerk.

Accountant's Association Standard Form (Revised 1913) Form 816

FREIGHT BILL

5–13–15 Eugene, Ore. Station.

5–13 1915

Consignee Order Ford Motor Co. Freight Bill No. 559

Destination—Notify

Route—Eugene Ford Auto Co

(Point of Origin to Destination)

To OREGON ELECTRIC RAILWAY CO., Dr., For Charges on Articles Transported:

Way-Billed From	Way-Bill Date and No.	Full Name of Shipper	Car Initials and No.
Port.	5/12/15 1047	Ford Auto Co.	G N 36753

Point and Date of Shipment	Connecting Line Reference	Previous Way-Bill References	Original Car Initials and No.
S. P. E. Portland		5/12/15 10.00	Swg. Assumed.

Number of Packages, Articles and Marks	Weight	Rate	Freight	Advances	Total
	10500				
7 Autos touring					
1 do Runabout 1380					
8 Horns					
8 Pr. Oil lamps					
8 Tail lamps					
8 Steel tops					
8 Pr. Elect. lamps					
8 Tops					
8 P. G. Curtains					
*Total Prepaid $————	12560	46	5778		

8 Wd. Shields
8 Speedmeters
Damage
680
40 ft. car ordered
OK. S. L. & C.

Received Payment.....191.. Total.....5778

[Stamped across face:] Oregon Electric Railway Co. Paid May 13, 1915. H. R. K. Sweek, Agt.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch

Portland

Order Date—5/12/15.

Assembly Stock.

Date Shipped—5/12/15.

Sold to Eugene Ford Auto Company, Eugene, Ore.

Charge—Same.

Terms: Strictly Net Cash. Shipped via Norman.

First National Bank.

Customer's Order.

7 Model T Touring cars fully equipped 56″ tread	3430.00
1 Model T Runabout fully equipped 56″ tread	440.00
	3870.00
Less 15%	580.50
	3289.50
Proportional Freight Detroit to Portland	331.58
	$3621.08

681514
681516
681533
681543
681610
681635
681795
681849 Rbt
Req. #11. GN 36753.
5/12/15 W.

5/12 W

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jul. 31, 1919. G. H. Marsh, Clerk.

Form 180
$3666.94 No. 1218
1.90

3668.84

FORD FORD
The Universal Car The Universal Car

Dated at Portland, Ore., June 2, 1915. 191—

At sight, on the arrival of goods, pay to the order of [Bank] Lumbermens National Bank Thirty six hundred sixty six and 94/100 Dollars, with exchange.

Value received and charge to the account of
FORD MOTOR COMPANY.
R. VAN HOOMISSEN,
Cashier.

To Eugene Ford Auto Co.,
Eugene, Oregon.
c/o First National Bank.

[Stamped across face:] Paid. Jun. 4, 1915. First National Bank, Eugene, Oregon.

INVOICE

FORD
The Universal Car.

FORD MOTOR COMPANY.
Portland Branch
Portland.

Order date—6/2/15.
Assembly Stk.
Date shipped—6/2/15.

Sold to Eugene Ford Auto Company,
Eugene, Ore.
Charge—Same.
Terms: Strictly net cash.
Norman. Shipped via
First National Bank
Customer's Order.

8 Model T Touring cars fully equipped 56″ tread	3920 00
Less 15%	588 00
	3332 00
Proportional freight Detroit to Portland	334 94
	$3666 94

681759
681799
682025
682050
682064
682065
682067
682072

Req. #10 SP. in SP. 61981
6/2/15 CHW
6/2 CHW

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

Form 180
$3666.75 No. 1189
1.90

3668.65
.48

3669.13

FORD FORD
The Universal Car The Universal Car

Dated at Portland, Ore., May 14, 1915. 191—

At sight, on the arrival of goods, pay to the order of [Bank] Lumbermens National Bank Thirty six hundred sixty six and 75/100 Dollars, with exchange.

Value received and charge to the account of
FORD MOTOR COMPANY.
R. VAN HOOMISSEN,
Cashier.

To Eugene Ford Auto Co.,
Engene, Ore.,
c/o First Nat. Bank.

[Stamped across face:] Paid May 15, 1915. First National Bank, Eugene, Oregon.

[Stamped on reverse side:] Lumbermens National Bank.

Accountant's Association Standard Form (Revised 1913) Form 816

FREIGHT BILL

Eugene, Ore. Station.

Order 5-15 1915

Consignee Ford Motor Co. Freight Bill No. 654

Destination—Notify

Route—Eugene Ford Auto Co

(Point of Origin to Destination)

To OREGON ELECTRIC RAILWAY CO., Dr., For Charges on Articles Transported:

Waybilled From	Way-Bill Date and No.	Full Name of Shipper	Car Initials and No.
Port.	5/13/15 1263	Ford M. Co.	Wab. 20666

Point and Date of Shipment	Connecting Line Reference	Previous Way-Bill References	Original Car Initials and No.
10.00 Swg.			

Number of Packages, Articles and Marks	Weight	Rate	Freight	Advances	Total
8 Autos					
8 Horns					
8 Pr. Oil lamps	12000				
8 Sets Tools	680	Damage			
8 Pr. E. Lamps	———				
8 Tops	12680	46	5833		
8 Pkg. Curtains					
*Total Prepaid $———					

Received Payment.....191.. Total.....5833

O R S L C Agent.

40 ft. car ordered.

[Stamped across face:] Oregon Electric Railway Co. Paid May 15, 1915. H. R. K. Agt.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch

Portland

Order Date—5/14/15

Assembly Stk

Date Shipped—5/14/15

Sold to Eugene Ford Auto Company, Eugene, Ore.

Charge—Same

Terms: Strictly Net Cash Shipped via

Norman

Customer's Order

1st National

8 Model T. Touring cars fully equipped 56″ tread	3920.00
Less 15%	588.00
	3332.00
Proportional freight Detroit to Portland	334.75
	$3666.75

681666
681687
681691
681700
681724
681726
681734
681748

Req #9 OER in Wab 20666

5/14/15 W

5/14—W

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals, for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

$3403.68
1 80

3405 48
48

3405 98

No. 1398

FORD
The Universal Car

FORD
The Universal Car

Dated at Portland, Ore., Sep. 8, 1915. 191—

At Sight, on the Arrival of Goods, Pay to the Order of [Bank] Lumbermens National Bank Thirty-four hundred three and 68/100 Dollars

With Exchange

Value received and charge to the account of

FORD MOTOR COMPANY.
R. VAN HOOMISSEN,
Cashier.

To Eugene Ford Auto Co.
Eugene Ore
c/o 1st Natl Bank

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch

Portland

Order Date—9/9/15

Assem. Stk.

Date Shipped—9/9/15

Sold to Eugene Ford Auto Company

Eugene, Ore.

Charge—Same.

Terms: Strictly net cash.

Norman. Shipped via

First National Bank

Customer's Order.

8 Touring cars 56″ tread	3520 00
Less 15%	528 00
	2992 00
Freight Detroit to Portland	363 68
Speedometers	48 00
	3403 68

850469 Floyd H. Cornwall 9/15

850522 Ethel Standard

862641

862644 Willhelm & Co.

862651 Bangs Livery Co.

862660 R A Stephens 9/25

862711 Francis Young 11/2

862727 F M Ramage Sept. 16th.

Contract. SPinSP 61958

9/9 W FSP

9/9 W

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

$3329/87 No. 1877

FORD

The Universal Car.

Form 180 FORD

The Universal Car

Dated at Portland, Ore., Mar. 19, 1916. 191—

At sight, on the arrival of goods, pay to the order of [Bank] Lumbermens National Bank Thirty three hundred twenty nine and 87/100 Dollars, with exchange.

Value received and charge to the account of

FORD MOTOR COMPANY.

R. VAN HOOMISSEN,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Ore.

c/o First National Bank.

[Stamped across face:] First National Bank, Eugene, Oregon. Paid. May 24, 1916. Lumbermen's National Bank, Portland, Oregon, U. S. A. 23896.

[Stamped on reverse side:] Pay to the order of any bank or banker. Mar. 29, 1916. Lumbermen's National Bank, Portland, Oregon.

FORD INVOICE.

The Universal Car

FORD MOTOR COMPANY.

Portland.

Order Date—Mar. 28, 1916.

Assy stock.

Date Shipped—Mar. 28, 1916.

Sold to Eugene Ford Auto Company, Eugene, Oregon.

Charge—Same.

Terms: Strictly Net Cash. Shipped via Norman.

First National Bank.

Customer's Order.

8 Touring cars 56″ tread.....	3520 00	
Less 15%	528 00	
	2992 00	
Prop. freight Detroit to Portland.....	337 87	#3329 87

1115500
1115957
1115941
1115931 C. I. Cover
1115943 "
1115933 "
1116008 "
1115791 "

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all

seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed:] U. S. District Court. Filed Sep. 5, 1916. G. H. Marsh, Clerk. District of Oregon.

Defendants' Exhibit "D."

FORD
The Universal Car.

INVOICE.

FORD MOTOR COMPANY.
Portland, Ore.

Order Date—May 25, 1916.
Assy. stock.
Date shipped—May 25 1916

Sold to Eugene Ford Auto Company
Eugene, Ore.
Charge—Same.
Terms: Strictly net cash.
Norman. Shipped via
Customer's Order.
Paid

1 Runabout 56″ tread.....	390 00	
Less 15%.....	58 50	
	331 50	
Retail freight Detroit to Portland	53 25	
10 gal gas and 4 qts oil.....	2 35	$387 10

(Req. 5537)
1208507

[Stamped across face:] Paid May 25, 1916. Ford Motor Company. Per Van H.

[Endorsed:] U. S. District Court. Filed Sep. 5, 1916. G. H. Marsh, Clerk. District of Oregon.

Defendants' Exhibit "F."

Form 180

$3667.42 No. 933

FORD FORD

The Universal Car The Universal Car

Dated at Portland, Ore., Mar. 6, 1915. 191—.

At sight, on the arrival of goods, pay to the order of [Bank] Lumbermens National Bank Thirty-six hundred sixty seven and 42/100 Dollars, with Exchange.

Value received and charge to the account of

FORD MOTOR COMPANY.
R. VAN HOOMISSEN,
Cashier.

To Eugene Ford Auto Co.,
Eugene, Oregon.
c/o First National Bank.

[Stamped across face:] First National Bank, Eugene, Oregon. Paid Mar. 10, 1915. Lumbermens National Bank, Portland, Oregon, U. S. A. 18118.

[Stamped on reverse side:] Pay to the order of any Bank or Banker. Mar. 6, 1915. Lumbermens National Bank, Portland, Oregon.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch.

Portland.

Order Date March 20th—5

7T Assem. Stk

1R Fctry. Stk.

Date Shipped—March 20th—5

Sold to Eugene Ford Auto Company.

Eugene, Oregon.

Charge—Same.

Terms: Strictly Net Cash.

Norman Shipped via

First National.

Customer's Order.

7 Model T Touring cars fully equipped 56" tread	3430.00
1 Model T Runabout fully equipped 56" tread	440.00
	3870.00
Less 15%	580.50
	3289.50
Proportional freight Detroit to Eugene, Oregon	332.38
	$3621.88

Motor No.	Car No.
686592	604969
686560	604979
686524	604982
686608	604983
686547	604985
687279	604989
687978	604994
694367 Rbt	622112 Rbt
5	OE in GN #36027
3/20 W	
3/20 W	

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed]: U. S. District Court. Filed Sep. 6, 1916. G. H. Marsh, Clerk District of Oregon.

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch.

Portland.

Order Date—6/19/15

Assembly Stk.

Date Shipped—6/17/15

Sold to Eugene Ford Auto Company.

Eugene, Oregon.

Charge—Same.

Terms: Strictly Net Cash.

Norman Shipped via

First National Bank.

Customer's Order.

8 Model T Touring fully equipped 56" tread..3920.00

Less 15%..... 588.00

3332.00

Proportional freight Detroit to Portland.. 332.94

$3664.94

592396
631877
631880
648899
648900
681998
682019
682039

Req. #4 SP 61840

6/19/15. CHW.

6/19 CHW

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

Form 180

$3664.94 No.1246

FORD FORD
The Universal Car The Universal Car

Dated at Portland, Ore., Jan. 19, 1915. 191—

At Sight, on the Arrival of Goods, pay to the Order of [Bank] Lumbermens National Bank Thirty-six hundred sixty-four and 94/100 Dollars.

With Exchange

Value received and charge to the account of

FORD MOTOR COMPANY.
R. VAN HOOMISSEN,
Cashier.

To Eugene Ford Auto Co.,
Eugene, Ore.
c/o First Natl. Bank.

[Stamped across face]: Paid Jun. 21, 1915. First National Bank, Eugene, Oregon. Lumbermens National Bank, Portland, Oregon, U. S. A. 20696.

[Stamped on reverse side:] Pay to the order of any bank or banker. Jun. 19, 1915. Lumbermens National Bank, Portland, Oregon.

Form 748

Standard
5-13-165M.

FREIGHT BILL

Station—Eugene, Oregon. Date—6 19 1915,

Consignee—Order Ford Motor Co Nfty Eugene Ford Auto Co.

Freight Bill No. 11882

Destination..... Via.....

To Southern Pacific Company, Dr., For Charges on Articles Transported

Way-Billed From	Waybill Date, Series and No.	Consignor	Car Initials and No.
East Portland Oregon	6 17 1915 1847	F. M. CO.	S. P. 61840

Connecting Line Reference	Original Point of Shipment	Original Waybill No. and Date	Original Car

Car Diverted at Salem Oregon

Number of Packages, Articles and Marks	Weight	Rate	Freight	Advances	Total
8 auto tops 8 horns 8 pr. oil lamps					
8 tail lamps 8 sets tools					
8 pr. elect. lamps 8 tops					
8 pack. curtains 8 W. Shields	1158O	46	5327		
ORS. C. Diversion			200		

LOCATION
Warehouse Post or Section

Received payment for the Company, ...191.. .....Agent
Cashier or Collector

Total.....
Prepaid....
To Collect....5527
Make checks payable to the company

SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS

[Printed in left-hand margin:]

The Company aims to serve the public pleasantly and well. Officers and Employees are working together in this, and the failure of one is a reflection upon all. Our customers will render a service by calling attention to delinquency. Address Assistant to the President, Flood Building, San Francisco, California.

This Freight Bill should accompany Claim for Overcharge, Loss or Damage

[Stamped across face:] Paid Jun. 21, 1915. A. J. Gillette, Agt.

Defendants' Exhibit "G."

FORD INVOICE

The Universal Car

FORD MOTOR COMPANY

Portland Branch

Portland

Order Date—8/27/15

Factory Stk

Date Shipped—8/27/15

Sold to Eugene Ford Auto Company, Eugene Ore

Charge—Same

Terms: Strictly Net Cash Shipped via Norman

First National Bank

Customer's Order

6 Touring cars 56″ tread	2640.00
1 Sedan 56″ tread	925.00
	3565.00
Less 15%	534.75
	3030.25
Proportional freight Detroit to Portland	300.17
Speedometers	42.00
	$3372.42

658934	Sedan	Do not include in chattel	925
857276	6 @ $400 each		15
858647			
858893	F. H. McCormick		4625
859655	Zinnall J. W.	Herbert A. Stoneberg	925
859662			
859665			

138.75

925
138.75

786.25

Contract
8″27/15. W.

SP in UP 85452
FSP

8/27

IMPORTANT NOTICE.

Before opening railroad car, be sure and examine car seals, keeping record of same and numbers of all seals, for your own protection in case of shortage or damage.

FORD MOTOR COMPANY.

[Endorsed]: U. S. District Court. Filed Sep. 6, 1916. G. H. Marsh, Clerk, District of Oregon.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 7, 1920. F. D. Monckton, Clerk.

Chattel Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That V. W. Winchell and F. M. Hathaway, copartners doing business as Eugene Ford Auto Co., for and in consideration of the sum of Twenty-eight Hundred Dollars to us in hand paid by First National Bank, Eugene, Oregon, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign and transfer unto the said First National Bank the following described personal property, the same being owned by us and in our possession at Eugene, Oregon, to wit:

8 Ford Touring Cars, 56″ tread.

Motor Nos.

1066396
1078981
1067359
1079020
1079019
1078965
1066547
1068871

56¢ revenue stamps attached to original note secured by this mortgage and canceled.

The above sale is intended as a mortgage to secure the said First National Bank, its successors or legal representatives the payment of one certain promissory note for the sum of TWENTY-EIGHT HUNDRED DOLLARS dated May 1, 1916, payable on demand with interest at 10 per cent per annum from date.

Now, should default be made in the payment of the said principal sum, or any installments of interest thereon, or should the said V. W. Winche*ll &* F. M. Hathaway sell or dispose of, or attempt to sell or dispose of, or remove or attempt to remove out of said County said property or any part thereof, without first obtaining the written consent of the said First National Bank or suffer the same or any part thereof to be taken on attachment or execution, then it shall be lawful for the said First National Bank, its successors or legal representatives with the aid and assistance of any person or persons whatsoever to enter any place or places where the said goods and chattels may be found and to take and carry away the same, and the same to sell or dispose of at public or private sale, as it may see fit, and out of the proceeds arising from such sale, to retain and pay the sums above mentioned and the costs and expenses and reasonable charges for making such sale, together with its reasonable attorney's fees, and the overplus, if any there be, pay to the said V. W. W*e*nchell and F. M. Hathaway, their assigns or legal representatives.

Witness our hands —— this 1st day of May, 1916.

F. M. HATHAWAY. [Seal]

V. W. WINCHELL. [Seal]

In presence of

J. VAN WILSON.

ARCHIE W. LIVERMORE.

State of Oregon,
County of Lane,—ss.

On this, the 1st day of May, A. D. 1916, personally came before me, a Notary Public in and for said County, the within named V. W. Winchell and F. M. Hathaway, to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the purposes therein named.

Witness my hand and seal this 1st day of May, 1916.

[Notarial Seal] ARCHIE W. LIVERMORE,
Notary Public for Oregon.

My Commission expires Sep. 20, 1919.

Filed for Record Jun. 2, 1919, 3:51 o'clock P. M. S. M. Russell, County Clerk. By P. M. Norton, Deputy.

State of Oregon,
County of Lane,—ss.

I, R. S. Bryson, County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, State of Oregon, do hereby certify that I have compared the foregoing copy of Chattel Mortgage with the original, and that the same is a correct transcript therefrom, and the whole of said original Chattel Mortgage as the same appears of record at page 380, Book No. 7, Lane County Chattel Mortgage Records, now in my official care and custody.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of the County Court in and for Lane County, State of Oregon, this 23d day of July, 1919.

[Seal] R. S. BRYSON,
County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, Oregon.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jul. 26, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 17, 1920. F. D. Monckton, Clerk.

Chattel Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That V. W. Winchell and F. M. Hathaway, copartners doing business as Eugene Ford Auto Co., for and in consideration of the sum of Eighty-four Hundred Dollars to us in hand paid by First National Bank, Eugene, Oregon, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign and transfer unto the said First National Bank the following described personal property, the same being owned by us and in our possession at Eugene, Oregon, to wit:

8 Touring cars, 56″ tread.

Motor Nos. 1067411
1067426
1067396
1067382
1068830
1067377
1068781
1067415

8 Touring car*d,* 56″ tread.

Motor Nos. 1115500
1115957
1115941
1115931 C. I. Cover
1115943 "
1115933 "
1116008 "
1115791 "

8 Touring cars, 56″ tread.

Motor Nos. 1116510
1067484
1062282
1008770
1116461
1116486
1116479
1116459

$1.68 revenue stamps attached to original note secured by this mortgage and canceled.

The above sale is intended as a mortgage to secure the said First National Bank, its successors or legal representatives the payment of one certain promis-

sory note for the sum of EIGHTY-FOUR HUNDRED DOLLARS, dated May 24, 1916, payable on demand with interest at 10 per cent per annum from date.

Now, should default be made in the payment of the said principal sum, or any installment of interest thereon, or should the said V. W. Winchell & F. M. Hathaway sell or dispose of, or attempt to sell or dispose of, or remove or attempt to remove out of said county said property, or any part thereof, without first obtaining the written consent of the said First National Bank or suffer the same or any part thereof to be taken on attachment or execution, then it shall be lawful for the said First National Bank, its successors or legal representatives, with the aid and assistance of any person or persons whatsoever, to enter any place or places where the said goods and chattels may be found and to take and carry away the same, and the same to sell or dispose of at public or private sale, as it may see fit, and out of the proceeds arising from such sale to retain and pay the sums above mentioned and the costs and expenses and reasonable charges for making such sale, together with its reasonable attorney's fees, and the overplus, if any there be, pay to the said V. W. Winchell and F. M. Hathaway their assigns or legal representatives.

Witness our hands —— this 24th day of May, 1916.

F. M. HATHAWAY. [Seal]

V. W. WINCHELL. [Seal]

In the presence of

_____,

ARCHIE W. LIVERMORE,

State of Oregon,
County of Lane,—ss.

On this, the 24th day of May, A. D. 1916, personally came before me, a Notary Public in and for said county, the within named V. W. Winchell and F. M. Hathaway, to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the purposes therein named.

Witness my hand and seal this 24th day of May, 1916.

[Notarial Seal] ARCHIE W. LIVERMORE,
Notary Public for Oregon.

My Commission expires Sept. 20, 1919.

Filed for record May 27, 1916, 2:03 o'clock P. M. Stacy M. Russell, County Clerk.

State of Oregon,
County of Lane,—ss.

I, R. S. Bryson, County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, State of Oregon, do hereby certify that I have compared the foregoing copy of Chattel Mortgage with the original, and that the same is a correct transcript therefrom, and the whole of said original Chattel Mortgage as the same appears of record at page 374, Book No. 7, Lane County Chattel Mortgage Records, now in my official care and custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the County Court in

and for Lane County, State of Oregon, this 23d day of July, 1919.

[Seal] R. S. BRYSON,
County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, Oregon.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jul. 26, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 17, 1920. F. D. Monckton, Clerk.

Chattel Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That V. W. Winchell and F. M. Hathaway, copartners doing business as the Eugene Ford Auto Co., for and in consideration of the sum of Twenty-eight Hundred Dollars to us in hand paid by First National Bank, Eugene, Oregon, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign and transfer unto the said First National Bank the following described personal property, the same being owned by us and in our possession at Eugene, Oregon, to wit:

8 Ford touring cars, 56″ tread.

Motor Nos.

1078972
1066345
1078975
1079064
1079033
1079013
1078948
1079104

56¢ revenue stamps attached to original note secured by this mortgage.

The above sale is intended as a mortgage to secure the said First National Bank, Eugene, Oregon, its successors or legal representatives the payment of one certain promissory note for the sum of TWENTY-EIGHT HUNDRED DOLLARS, dated April 22, 1916, payable on demand with interest at 10 per cent per annum from date.

Now, should default be made in the payment of the said principal sum, or any installment of interest thereon, or should the said V. W. Winchell & F. M. Hathaway sell or dispose of or attempt to sell or dispose of or remove or attempt to remove out of said County said property, or any part thereof, without first obtaining the written consent of the said First National Bank or suffer the same or any part thereof to be taken on attachment or execution, then it shall be lawful for the said First National Bank, its successors or legal representatives, with the aid and assistance of any person or persons whatsoever, to enter any place or places where the said goods and chat-

tels may be found, and to take and carry away the same, and the same to sell or dispose of at public or private sale, as it may see fit, and out of the proceeds arising from such sale to retain and pay the sums above mentioned and the costs and expenses and reasonable charges for making such sale together with its reasonable attorney's fees and the overplus, if any there be, pay to the said V. W. Winchell and F. M. Hathaway, assigns or legal representatives.

Witness our hands —— this 22d day of April, 1916.

V. W. WINCHELL. [Seal]
F. M. HATHAWAY. [Seal]

In presence of
R. CLAUDE GRAY.
ARCHIE W. LIVERMORE.

State of Oregon,
County of Lane,—ss.

On this, the 22d day of April, A. D. 1916, personally came before me, a notary public in and for said county, the within named V. W. Winchell and F. M. Hathaway, to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the purposes therein named.

Witness my hand and seal this 22d day of April, 1916.

[Notarial Seal] ARCHIE W. LIVERMORE,
Notary Public for Oregon.

My Commission expires Sept. 20, 1919.

Filed for Record Jun. 2, 1916, 3:51 o'clock P. M. S. M. Russell, County Clerk. By P. M. Norton, Deputy.

State of Oregon,
County of Lane,—ss.

I, R. S. Bryson, County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, State of Oregon, do hereby certify that I have compared the foregoing copy of Chattel Mortgage with the original, and that the same is a correct transcript therefrom, and the whole of said original Chattel Mortgage as the same appears of record at page 379, Book No. 7, Lane County Chattel Mortgage Records, now in my official care and custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the County Court in and for Lane County, State of Oregon, this 23d day of July, 1919.

[Seal] R. S. BRYSON,
County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, Oregon.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jul. 26, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 17, 1920. F. D. Monckton, Clerk.

Chattel Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That we, V. W. Winchell and F. M. Hathaway, co-partners doing business as Eugene Ford Auto Co., for and in consideration of the sum of Fifty-six Hundred ($5600.00) Dollars to us in hand paid by The First National Bank of Eugene, Oregon, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign and transfer unto the said First National Bank, of Eugene, Oregon, the following personal property, the same being owned by us and in our possession at Eugene, Oregon, to wit:

16 Touring cars, 56″ tread.

Motor Nos.	Motor Nos.
1003662	1016668
1003677	1017394
1006667	1017415
1006689	1017416
1006742	1017423
1019299	1017449
1019307	1017468
1019310	1017495

$1.12 revenue stamps attached to original note secured by this mortgage and cancelled.

The above sale is intended as a mortgage to secure the said First National Bank, of Eugene, Oregon, its successors, assigns or legal representatives the payment of one certain promissory note for the sum of Fifty-six Hundred Dollars, dated March 2, 1916, payable on demand, with interest at 8 per cent per annum from date.

Now, should default be made in the payment of the said principal sum, or any installment of interest thereon, or should the said V. W. Winchell and F. M. Hathaway, sell or dispose of, or attempt to sell or dispose of, or remove or attempt to remove out of said County said property, or any part thereof, without first obtaining the written consent of the said First National Bank, of Eugene, Oregon or suffer the same or any part thereof to be taken on attachment or execution, then it shall be lawful for the said First Nat'l Bank, of Eugene, Oregon, its successors or legal representatives, with the aid and assistance of any person or persons whatsoever, to enter any place or places where the said goods and chattels may be found and to take and carry away the same, and the same to sell or dispose of at public or private sale, as it may see fit, and out of the proceeds arising from such sale to retain and pay the sums above mentioned and the costs and expenses and reasonable charges for making such sale, together with its reasonable attorney's fees, and the overplus, if any there be, pay to the said V. W. Winchell and F. M. Hathaway, their heirs, assigns or legal representatives.

Witness our hands —— this 2d day of March, 1916.

V. W. WINCHELL. [Seal]

F. M. HATHAWAY. [Seal]

In presence of

J. VAN WILSON.

A. W. LIVERMORE.

State of Oregon,
County of Lane,—ss.

On this, the 2d day of March, A. D. 1916, personally came before me, a Notary Public in and for said County, the within named V. W. Winchell and F. M. Hathaway, to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the purposes therein named.

Witness my hand and seal this 2d day of March, 1916.

[Notarial Seal] ARCHIE W. LIVERMORE,
Notary Public for Oregon.

My Commission expires Sep. 20, 1919.

Filed for Record Jun: 2, 1919, 3:51 o'clock P. M. S. M. Russell, County Clerk. By P. M. Norton, Deputy.

State of Oregon,
County of Lane,—ss.

I, R. S. Bryson, County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, State of Oregon, do hereby certify that I have compared the foregoing copy of Chattel Mortgage with the original, and that the same is a correct transcript therefrom, and the whole of said original Chattel Mortgage as the same appears of record at page 380, Book No. 7, Lane County Chattel Mortgage Records, now in my official care and custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the County Court in and for Lane County, State of Oregon, this 23d day of July, 1919.

[Seal] R. S. BRYSON,

County Clerk and Ex-officio Recorder of Conveyances in and for Lane County, Oregon.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jul. 26, 1919. G. H. Marsh, Clerk.

No. 3436. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 17, 1920. F. D. Monckton, Clerk.

No. 3436

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. M. HATHAWAY, and FANNIE S. WINCHELL, as Admininstratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partneship Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

ISHAM N. SMITH,
Attorney for Appellants.

Suite 612 American Bank Bldg.
Seattle, Wasihngton.

PRESS OF PLINY L. ALLEN CO., INC., SEATTLE

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TOPICAL INDEX

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STATEMENT OF THE CASE.

For several years prior to 1916 F. M. Hathaway and V. W. Winchell were doing business at Eugene, Oregon, as Eugene Ford Motor Company, and were handling automobiles and automobile parts. They dealt almost exclusively in Ford Motor Company products.

Sept. 10, 1915, they made a contract with Ford Motor Company (Tr. pp. 9-36) relative to their business for 1916.

Thereafter, on May 25, 1916, Ford Motor Company attempted to cancel that contract, and thereafter on June 3, 1916, filed its action in replevin, seeking to recover possession of certain property described particularly in its complaint (see par. 6, Amended Complaint in Replevin, Tr. pp. 259-262.) Thereafter, on June 10, 1916, the Ford Motor Company paid $12,676.25 to the First National Bank at Eugene, Oregon, in satisfaction of mortgages which Winchell and Hathwaay had given the bank upon certain Ford automobiles.

On August 14, 1916, the Ford Company filed its Amended Complaint in the Replevin case alleging:

VII.

That thereafter plaintiff pursuant to the terms of said contract with the defendents mentioned in the last preceding paragraph, duly cancelled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above-mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of thirty-four hundred and one and 12-100 dollars ($3401.12), which amount

in the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings the said sum of thirty-four hundred and one and 12-100 dollars into this court in this action, ready to be paid to defendants.

On June 14, 1916, these appellants answered the original complaint in the replevin action; and

On July 28, 1916, Ford Motor Company filed its reply thereto. (Tr. pp. 269-271). Both the answer and reply was permitted to stand as such after the amended complaint was filed.

The trial of the replevin case resulted in verdict for Winchell and Hathaway against Ford Motor Company for $16,077.50, together with $6,000.00 damages, whereupon judgment was entered, which was thereafter affirmed by this Court in,

Ford Motor Co., vs. Winchell et al., 245 Fed. 850.

THE PRESENT CASE.

After the mandate from this Court was filed, Ford Motor Company brought this suit, (Tr. pp. 3-37) seeking to enjoin the enforcement of the judgment in replevin, and to offset the amount paid by it to the bank (Tr. pp. 8-9), and procured a temporary restraining order and show cause order therein. (Tr. pp. 37-43).

On March 16, 1918, Winchell and Hathaway filed their answer to the bill, claiming that the matters involved were Res Adjudicata, and pleading estop-

pel. Defendants attached to their answer in equity the pleadings in the replevin case (Tr. pp. 64-67), and also a copy of a petition and motion for new trial filed therein by the Ford Motor Company (Tr. pp. 75-79); and accompanied the answer with a motion to dissolve the restraining order and dismiss the case, supporting such motion by the affidavits of Luke L. Goodrich, F. M. Hathaway, N. W. Winchell, and P. E. Snodgrass. (Tr. pp. 80-90)

The matter was heard before Judge Wolverton, who on March 25, 1918, filed an order dissolving the order to show cause and denying the application restraining order (Tr. pp. 91-92). *No appeal was ever taken from this order, although involved the merits of the controversy.*

Thereafter on March 27, 1913, Ford Motor Company paid the judgment in replevin for $22,077.50, with the interest and costs.

Thereafter on August 2, 1918, that Company filed its amended bill, wherein it sought decree for money judgment,viz., to recover $12,676.38, with the interest from Sept. 11, 1916, basing its alleged right of recovery on two theories:

First: That Winchell and Hathaway executed the mortgages to the bank as agents of the Ford Motor Company upon its property, and converted the moneys thus obtained to their own use; and by payment to the bank the Ford Motor Company became subrogated to the rights of the mortgagee and

Second: That the mortgage of Winchell and Hathaway to the bank was upon their lien on said automobiles which they acquired by paying to Ford Motor Company 85% of the purchase price of the automobiles described in the mortgage before they took the cars in their possession, and that such payment was necessary to enable the Ford Company to repossess itself of its property.

On Sept. 13, 1918, these appellants filed their motion to strike the Amended Bill and dismiss the case (Tr. pp. 109-116) upon the grounds,

1. That the matters involved were Res Adjudicata as to title and right of possession of the automobiles, and the alleged equities arising out of the payment to the bank;

2. That the preliminary injunction was dissolved, and no appeal taken;

3. That the payment to the bank was adjudged in the Replevin action to be voluntary and no rights of subrogation existed;

4. That the charges of embezzlement and conversion were wrongfully inserted in the Amended Complaint, and were in conflict with the Adjudication in the replevin case.

Sept. 30, 1918, this motion was overruled (Tr. pp. 117-118), and thereafter on Jan. 24, 1919, these appellants filed their answer in the suit (Tr. pp. 118 to 177), denying the equities of the Bill, and affirmatively re-alleged the proceedings in the re-

plevin case, asserting that all matters in the Bill were Res Adjudicata, and pleading estoppel.

Defendants also sought to recover $800.00 as deposit money paid to Ford Motor Company when the contract was made (Tr. pp. 157-159), and the additional sum of $1900.00 as rebates from sales of automobiles (Tr. pp. 159-161).

July 18, 1919, the appellee filed its reply and the cause was tried that day.

Thereafter the Court entered its decree (Tr. pp. 181-182) in favor of appellee for the recovery of the sum paid by it to the bank with interest, less the deposit money and certain rebates.

On Aug. 4, 1919, appellants filed their motion for re-hearing and re-argument, also objections to decree, (Tr. pp. 183-191), which were thereafter argued and were overruled, Oct. 6, 1919 (Tr. pp. 192).

Thereafter on Dec. 4, 1919, petition for appeal (Tr pp. 193-195) accompanied by assignments of errors (Tr. pp. 195-209) was filed and served, and this appeal perfected.

ASSIGNMENTS OF ERRORS.

The appellants assert that the lower court erred against their just rights in the following particulars for the following reasons:

1.

In refusing to strike the Amended Bill and to dismiss the case because:

(a) The matters involved were Res Adjudicata as to title and right of possession of the automobiles;

(b) The payment by appellee to the bank was in truth and in fact voluntary and had been so adjudged; because in the replevin case the question of the payment to the bank was brought directly in issue under paragraph VII of the Amended Complaint, and the proceedings had at the trial; and thereafter upon motion for a new trial and to counterclaim the amount paid to the bank against the judgment; the rulings thereon were adverse to the Ford Company, and on review in that case errors were predicated involving these questions and were never argued, but were abandoned, and thereby all matters relating to said payment became Res Adjudicata.

(c) Appellants mortgaged the automobiles as their own, for their own benefit, and did not mortgage them as agents for the Ford Motor Company, nor obtain money thereon as such agents nor convert any money of the Ford Motor Company;

(d) The preliminary injunction sought in this cause was denied, no appeal taken therefrom, and the hearing on the application therefor involved the merits of this case, and thereby became Res Adjudicata;

(e) The Ford Motor Company voluntarily paid the judgment in replevin in full while this case was pending.

The Court erred in rendering decree for Ford Co. because

2.

The merits of this cause were decided in the replevin case, adversely to it; and,

3.

The payment by Ford Motor Company to the bank was not made by reason of any duty arising by contract or law or any privity by contract or otherwise, but such payment was wholly voluntary;

4.

The evidence is insufficient to sustain the decree in the particulars hereafter shown;

5.

Appellee did not come into Court with clean hands, because;

(a) It wrongfully terminated its contract with appellants;

(b) It made no demand for possession before instituting replevin suit;

(c) It made no tender of any sum or of the deposit money or rebates before starting the replevin case;

(d) It trespassed upon the business of the defendants wrongfully and used the process of replevin maliciously.

6.

The Court erred in failing to render decree for appellants; and,

7.

In overruling and denying the motion for rehearing and reargument made after decree.

On this appeal the appellants rely upon the following

POINTS AND AUTHORITIES.

Point 1.

By the answer in replevin the title to the property involved was brought in controversy. The judgment in that case in appellants' favor was *Res Adjudicata* as to title.

Bauer v. Rynd et al (Cal.) 150 Pac. 780.

Point 2.

Section 1251 B. U. S. Compiled Statutes 1916, Vol. II, p. 223, requires the litigation of equitable rights in actions at law and adopts the reformed procedure which prevails in many State Courts.

United States vs. Richardson, 223, Fed. 1010.

Burroughs Adding Machine Co. vs. Scandinavian Bank, 239, Fed. 179.

U. P. R. Co. vs. Says, 246, Fed. 561.

Maine Northwestern Development Co., vs. Northwestern Commercial Co., (9 C. C. A.)

Upson Nut Co., vs. American Shipbuilding Co., 251 Fed. 707.

Point 3.

Under the reformed procedure, the several State Courts hold that in replevin actions all legal and equitable rights of the parties *inter sese* arising out

of, connected with, relating to, or depending upon, the contract and the property involved, must be tried.

Zimmerman Wells Co., vs. Sunset Lumber Co., 57 Oregon, 309; 11 Pac. 690; 32 L. R. A. N. S. 123.

Cobbey on Replevin, 2nd Ed. Sec. 1148.

Brook vs. Bayless, 6th Okla., 568; 52 Pac. 738-739.

Emerson-Brantigham Implement Co., vs. Ritter, (Okla.) 170 Pac. 482 (483 et seq.) collating cases.

Gilbert vs. Husted, 50 Wash. 61; 96 Pac. 835 (per Rudkin J.).

McCormick Harvesting Machine Co., vs. Hill, 79 S. W. 745; 104 Mo. App. 544.

Ramey & Bro. vs. Capshaw, 75 S. W. 479, 71 Ark. 408.

Collins vs. Leather Co., 190 S. W. 990 (Mo. App.)

34 CYC 1418—Note 88.

Townsend vs. Minn. Cold Storage, 46 Minn. 121; 48 N. W. 682.

Miller vs. Thayer, (Kans.), 143 Pac. 537.

The rule in Kansas is cited and sustained as to that state in:

Clement Eustis & Co. vs. Field & Co., 147 U. S. 467; 37 L. 244.

Point 4.

In actions at law, the right of recovery is limited to the date of the commencement of the action;

while in suits in equity relief is granted down to the time of the trial.

Under the reformed procedure as adopted by Congress, paragraph VII of the Amended Complaint tendered the issue relating to the payment to the bank, and all matters pertaining thereto were therefore directly involved in the replevin case although such payment was on June 10, 1916, after the case was instituted on June 3, 1916.

Duessel vs. Proch, 78 Conn. 3b3; 62 Atl. 152.
Kelly vs. Galbraith, 186 Ill. 593 (610).
Randel vs. Brown, 2 How. 406; 11 L. Ed. 318.
Peck vs. Geedberlett, 109 N. Y. 180, 16 N. E. 350.

Point 5.

Where one pays the debt of another in the absence of any contractual or legal obligation or of any privity of relationship to the debt, and without the request, acquiescence, or knowledge of the debtor, he is a volunteer in making such payment and cannot recover the amount paid.

Lipman Wolfe & Co. vs. Phoenix Assurance Co., 258 Fed. 544 (9th C. C. A.)

Point 6.

The law of *Res Adjudicata* embraces all justiciable causes involved in the controversy whether actually litigated or not.

The Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S. 683; 39 L. Ed. 859.

Point 7.

The Amended Bill stated no grounds for equit-

able jurisdiction. It sought the recovery of money only, and all matters alleged were properly triable in a Court of Law, before a jury in an action for money had and received.

ARGUMENT.

The various questions involved will be presented under the following classifications:

(a) The Court erred in rendering decree for plaintiff upon *MATTERS OF FACT,* because the whole evidence is insufficient to show.

1. *Title* in the machines involved in the replevin case in the FORD MOTOR COMPANY. The evidence does show the title, ownership and right of possession in such machines were in defendants and appellants;

2. *The Rebates* allowed by the Court are sufficient in amount;

3. *That the Payment by Ford Motor Company* of $12,676.38 was other than voluntary or that appellee owed any duty either at law or by contract or sustained any privity of relationship to such indebtedness or the mortgages securing it as required or enabled it to pay such debt and thereby to become subrogated either at law or in equity to the rights of the mortgagee.

(b) The Court erred in rendering decree for plaintiff as a *MATTER OF LAW*, because all matters set forth in the Amended Bill were and are

Res Adjudicata and the Ford Motor Company was and is *Estopped* by the record in the replevin case from attempting to relitigate them.

(c) Court erred in entertaining jurisdiction of the Amended Bill and trying the matters alleged in this suit because the Amended Bill seeks a money judgment only and all matters involved therein are triable at law and involve only legal rights to be submitted to and tried by a jury under a claim of *Money Had and Received.*

At the trial in equity, oral evidence was introduced, which is set out in the Transcript at pp. 209 to 241, inclusive; in addition, certain exhibits were introduced, consisting of the entire printed Transcript and briefs in error, in the *replevin* case, and certain chattel mortgages, bills of lading and sight drafts set forth herein.

There is a stipulation on file in this cause wherein the parties by counsel agree that these exhibits need not be printed but can be used on this appeal by reference. This stipulation was approved by this Court and an order made accordingly.

We shall consider the outline of Argument last above set out and discuss the questions therein referred to, ~~seriatim.~~ *seriatim*

FIRST: MATTERS OF FACT.

(1)

The entire evidence is insufficient to show that the *TITLE* to the automobiles involved in the *re-*

plevin suit and in the mortgages was in the Ford Motor Company; but did show that such Title passed to Winchell and Hathaway.

The contract between these parties (pp. 10-36, especially par. 10, p. 15; par. 20, p. 17; par. 23, p. 19; pars. 28 and 29, pp. 23, 24; par. 33, p. 26; and par. 39, p 28) provides that Winchell and Hathaway shall pay 85% of the full advertised list price of the automobiles at the time of their consignment (par 10, p. 15); that in case of claims for damages against the Railroad Company the rights of the parties shall be as fixed in par. 20, p. 17, and that the Ford Company is relieved of liability to Winchell and Hathaway for injury or damage to the automobiles after delivery to carrier; also that Winchell and Hathaway shall pay taxes on such automobiles either in their possession or while in transit or otherwise for delivery to them (par. 23, p. 19); that the commission on all sales shall be 15% of the list price (which is the entire balance of such list price after the payment of the 85% to the Ford Company) and shall be allowed additional commissions on the net amount of business (*rebates* under Secs. 28 and 29, pp. 23-24); that they are allowed certain discounts on parts handled by them from their stock (par. 33, p. 26), and finally that the whole 85% of the list price on consigned automobiles, with cost of transportation, shall be paid on sight draft drawn by Ford Company when consignments are shipped and such payments shall be made

"when shipments arrive, or when sight drafts are presented." (par. 39, p. 28).

It is thus seen that by the contract the appellants were required to pay Ford Company the entire wholesale price, to-wit: 85% of the list price, plus all cost of transportation, before the automobiles were delivered to them. They were also required to pay all taxes and to relieve the Company of all damages to goods in transit or otherwise, for delivery to them.

The allowances of *rebates and discounts* based upon the volume of business included the cars in their possession, although they had not actually sold them to customers.

We quote from the testimony:

WITNESS McNAMARA: (pp. 290-300) (Ford Company's Chief Clerk in charge of Winchell and Hathaway matters) testifies as to sight drafts and shows several drafts drawn for 85% of the purchase price and "paid" before the machines were delivered to appellants.

WITNESS NORMAN: (pp. 300-306) (Manager of Ford Company at Portland) testifies to the meaning of par. VII of the Amended Complaint in *replevin,* and shows that the $3401.12 there offered as a tender is earned rebate on business done, after deducting the $12,676.38 paid to the bank, on June 10, 1916, after the *replevin* case was started on June 3, 1916.

WITNESS V. W. WINCHELL (pp. 306-310) (deceased defendant) says: "(p. 306) And you paid for them at the time they were delivered? A. Yes sir. Q. Did you ever pay any other price to the Ford Motor Company than the price you paid upon delivery? A. No sir.

(p. 307) You added to the price paid the Ford Motor Company your profit, did you? A. Yes sir. Q. And kept the money? A. Yes sir. Q. And if you didn't sell the car you simply had the car on your hands? A. Yes sir. Q. Did the Ford Motor Company take them back off you? A. No sir.

(p. 309) Witness identifies the sight draft representing six touring cars and one sedan which were paid for before they came into appellants' possession, and says, "Q. Was there any further sum remaining to be paid for these cars? A. No sir. Q. Nothing whatever, in any way, shape or form? A. No sir.

WITNESS F. M. HATHAWAY (p. 312) (defendant and appellant) says: "Q. State to the jury whether or not there was any further sum to be paid by you. A. No sir. Q .Then when you sold the cars you got your profit? A. Yes sir. Q. *And if you didn't sell them, you didn't get the profit. Is that right? A. They remained ours.*

The same witness gives the following important testimony on the question of rebates, and shows that rebates were allowed and paid on the cars received by appellants and paid for by them although the cars were not resold.

"(p. 311) Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus—(sic-rebates)—just as if you passed them out to the public, do they? A. Yes sir. Q. That is, they were sold, as far as the Ford Motor Car Company is concerned? A. That is the way. Q. And fully paid for, as far as you are concerned? A. Yes sir. Q. And if you don't sell them again, that is your loss, is it? A. They remain our property"

* * * * * * *

(p. 312) Q. Now, Mr. Hathaway, in all the years you have dealt with them, has there ever been a time, a single instance but what you have had to pay for the car on delivery to you? A. No, we only pay the one price. Q. And you pay that on delivery to you? A. No, we only pay the one price. Q. And you pay that on delivery of the car? A. Yes. Q. And you treat the car as yours and go on and sell it or dispose of it as you like? A. Yes sir. Q. You have done that for three years? A. Four years. I was with the Ford Company. Q. You were their agent over in eastern Oregon? A. Yes sir. Q. Were you ever called upon to make any further price—(sic—payment)—than the price you pay on delivery? A. No sir. Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get these cars? A. No sir. Q. Were you ever asked to? A. Never asked to. Q. Did they ever claim anything different? A. No, there was nothing.

WITNESS NORMAN (pp. 312-337) (Portland Manager of Ford Company) (recalled in rebuttal. Cross Examination) says, referring to the payment of the sight drafts identified at pp. 313-337:

"Q. Well you got your money out of it, didn't you? A. Yes sir. Q. And you made the cars to sell? A. Yes sir. Q. And you shipped them to them to sell? A. Yes sir. Q. And they were selling your cars only. Everything they sold were Ford cars? A. Yes sir."

Furthermore, each sight draft (Tr. pp. 313-337) was drawn as per invoice and bill of lading thereto attached—and the invoices specifically described the property, noting it as "Sold to Eugene Ford Auto Company, Eugene, Oregon. Charge, Same; Terms, Strictly Net Cash."

All the above testimony was given in the *replevin* case and is found in the Transcript in that case as well as in the present case. The entire Transcript in *replevin* was introduced here.

WITNESS F. M. HATHAWAY (pp. 227-235) gave oral testimony at the trial of this suit as follows: Q. (p. 229) Did you borrow any money from the bank for the Ford Motor Company and convert it to your own use? A. We had no authority whatever. Q. Did you do anything of the kind? A. No sir. Q. Whose property, if any, did you mortgage to the bank to secure payment of the notes? A. Mortgaged our own property. Q. Was it property that you owned and had paid for? A. Yes sir.

Q. And for which you held receipts in full? A. Yes sir.

All the above testimony is uncontradicted. The claim of ownership by appellant was not denied by the Ford Company, except that it asserts that its contract provides that Title shall remain in it until the cars are resold. But notwithstanding such contract the entire evidence established a course of dealing between the parties whereby Title passed to appellants for the following reasons: (a) Cars were paid for in full before delivery from the railroad company to the appellants; (b) The cars remained theirs and were carried over from year to year; (c) They paid all taxes levied against the cars; (d) which were shipped at their risk; (e) and added their profit to the price so paid and (f) in their settlement of rebate and added commissions to the 15% originally allowed, they charged and received and were paid rebates and commissions on the cars still in their possession although not sold to the public.

Stronger proof of title is not possible.

Such title was pleaded in the answer in the replevin case, and the verdict was in favor of appellants.

SECOND: MATTERS OF FACT.

(II)

REBATES. The uncontradicted testimony above quoted shows that appellants were entitled to re-

bates on the cars involved, and discloses, in connection with the testimony hereafter quoted, that the Court did not allow enough rebates.

The decree (pp. 181-182) allows $2138.10 with interest as a credit on the amounts claimed by Ford Company in this suit. This credit arises from the deposit money ($800.00) plus rebates ($2325.58) and upon which the Court erroneously allowed a credit of $987.48 by payment made Aprli 11, 1916. (See opinion of Court attached to this brief as Exhibit A).

At the trial of this suit WITNESS GEO. W. ALLING (accountant for Ford Motor Company at Portland) testified (pp. 235 to 241) that as such accountant he found a certain check paid to appellants as rebates. By agreement this check was afterwards filed. It is set forth in the Record at pages 257-258, and is dated April 11, 1916, and is *"3% on business."* Vol. 1915-1916.

The check was issued and paid in April, 1916, and the replevin case was not started till June, 1916.

That payment could not include the rebates on the cars in question, because the appellants did not borrow the money nor execute the mortgages to the First National Bank of Eugene until April 22, 1916, May 1, 1916, and May 24, 1916 (see Par. VI, Plaintiff's Amended Bill, pp. 94-95) and the drafts set forth therein (pp. 313-337). The following exhibits were not paid at that time, nor did the cars

represented by such drafts come into the possession of the appellants until after the receipt of that check for rebate of 3%. The Transcript shows:

Defendants Exhibit	For	Paid
A. (pp. 313-315)	$3327.54	May 24, 1916
B. (pp. 315-317)	$3327.54	May 24, 1916
Unnumbered (p. 327)	$3329.87	May 24, 1916
D. (pp. 329-330)	$	May 25, 1916

It is plain that the cars represented in these transactions could not possibly be involved in the check of April 11, 1916, and that rebates arose after April 11, 1916.

The evidence does not show that the rebate check involved was a payment on the amount claimed by appellants. On the other hand WITNESS WINCHELL (deceased defendant) shows (p. 310) (Testimony quoted from Transcript in replevin case) that this particular payment was considered by him and Godon, who was an agent of the Ford Company in a tentative settlement about six months before the case was tried. *Winchell says,* "And the five per cent bonus on the amount of 36 touring cars at $493.25 and the sedan at $983.25? A. Yes. *Less a partial payment, probably six months ago,* some time ago on this bonus money. Q. And when you and Mr. Godon figured up the bonus money that he said he would get you, what did you figure it up at that time? A. I can't give the exact amount.

The verdict in the replevin case was rendered Sept. 6, 1916, (Tr. p. 271) and the check dated April 11, 1916, for 3% rebate was *"about six months ago"*; but that rebate of 3% was not a payment on the rebate of 5%.

WITNESS NORMAN (pp. 303-306) testifies at pp. 301-302: "Q. Now it is pleaded in the complaint here that the plaintiff tendered into Court and have tendered into Court with the Clerk, the sum of $3401.12. Will you state to the jury how that amount was arrived at as a refund on these cars? * * * A. I am not famliiar with those figures at this time. Q. What does the $3401.12 represent? A. *It represents the contract deposit and rebate they have coming on cars over a certain volume of business that they had on straight 15%; we pay a certain rebate, additional rebate, and that is the earned rebate.*

The draft set forth at pp. 257-258 of the Transcript is for $987.48. As per WINCHELL'S testimony, *supra,* we deduct this draft (for $987.48) from the amount of rebates ($3401.12) testified to by NORMAN, *supra,* and find a balance of $2413.64, to which should be added the legal interest from June 3, 1916, (date of filing replevin case) down to July 28, 1919 (date of trial of equity suit).

The decree (pp. 181-182) allowed rebates of $1338.10 only, and is too small by $1075.54 with interest.

THIRD: MATTERS OF FACT.

III.

The payment by the Ford Motor Company of $12,676.38 to the Bank was purely voluntary.

The Amended Bill (Tr. pp. 92-108) alleges two separate causes of action arising out of this matter, to-wit: *the First Cause of Action* (Tr. pp. 93-100) asserts a pretended equity because it says that Winchell and Hathaway borrowed the money from and executed the mortgages to the bank * * *'' (Par. VI, pp. 94-95) *as the agents of the plaintiff, under and in accordance with the provisions of said contract referred to in paragraph III of this Amended Bill of Complaint, and said defendants after procuring said sums of money as the agents of the plaintiff converted the same to their own use and benefit,''* and then alleges the issuance of the injunction in this suit and its dissolution,'' and thereafter, that the Ford Company paid such judgment. Ford Company says that by reason of the payment to the bank of the sum of $12,676.38 on the chattel mortgage, and of the additional payment of $22,-077.50, with interest and costs, on the judgment, it made a double payment, under compulsion, because (a) the mortgage executed by appellant as agent to the plaintiff was a lien on the property involved in the replevin action, and (b) such amount was not credited upon the judgment in replevin, but, on the other hand, Winchell and Hathaway recovered $16,077.50 as the value of their ownership

in the automobiles, plus damages, and the said sum of $16,077.50 necessarily included the same amount which Ford Company paid the bank. The First Cause of Action claimed the right of subrogation.

The Second Cause of Action (pp. 100-107) asserts that the mortgages were valid because Winchell and Hathaway advanced 85% of the list price of the automobiles to the Ford Company, and (Par. VI, pp. 101-102) "thereby became and were entitled to and had a lien upon the automobiles to secure the repayment thereof, and thereby, upon receipt of the possession of said automobiles became entitled to and had a special property to the extent of said lien in said automobiles"—and that the effect of the chattel mortgage was to transfer such special property to the bank.

The Complaint then alleges in both causes of suit that the Ford Company was compelled to pay the mortgage to protect its right.

The replevin case was instituted June 3, 1916, and the payment to the bank was not made until June 10, 1916—one week later. Both Causes of Action, therefore, confess that the plaintiff wrongfully started the replevin action and used the process of the lower Court abusively, thereby pleading that the Ford Company was guilty of iniquity in relation to the subject matter in controversy.

Certified copies of the chattel mortgages are in evidence and are printed as part of the Transcript being pasted in after the Transcript was made up.

These mortgages disprove each Cause of Suit. They show that Winchell and Hathaway acted for themselves only and not as agents of the Ford Company in their execution; that they mortgaged the property itself as their own and asserted that they were owners of it; that they did not assign or transfer any pretended lien arising out of the payment of 85% of the alleged purchase price but that they recited in such mortgages that they owned the property and had it in their possession in Lane County, Oregon.

In addition they testified:

WITNESS WINCHELL (p. 310) (deceased defendant) (Quotation from the testimony in replevin csae):

"Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene, and paid some debt of yours there. Did you ever authorize anyone to do that? A. No, sir. I didn't know of that being done. Q. Was it done with even your knowledge? A. No sir. Q. Long after the action was commenced and your answer filed? A. Yes sir.

WITNESS HATHAWAY (pp. 227-235) (Defendant and appellant) testified at the trial of this suit:

"Q. Mr. Hathaway, at the time Mr. Godon, if he was the person or representative of the Ford Motor Company, paid certain notes of Winchell and Hath-

away at the First National Bank of Eugene, Oregon, as Mr. Snodgrass has just testified, were you present when that was done? A. No sir. Q. Was it done with your knowledge? A. No. Q. Or with your consent? A. No sir. Q. Or with Mr. Winchell's knowledge of consent? A. No sir. Q. Did you know of the actual payment of the notes until after it had been done? A. It was the day after, as I remember it.

Further testifying as to the capacity in which Winchell and Hathaway acted in executing mortgages, WITNESS HATHAWAY says, (Tr. pp. 228-229):

Q. Mr. Hathaway, in borrowing the money from the bank—in borrowing the particular property, money represented by the notes set out in your answer from whom did you borrow the money? A. Borrowed the money from the First National Bank of Eugene. Q. For whom? A. For our own personal use. Q. I will ask you whether or not you borrowed it on your own individual credit. A. Yes sir. Q. Was this money that you borrowed borrowed for the Ford Motor Company? Did the Ford Motor Company have anything to do with the borrowing of this money? A. The Ford Motor Car Company didn't know anything about that transaction. Q. Did you borrow it for them, or did they have anything to do with it? A. They had nothing to do with it whatever. Q. Did you borrow any money from the bank for the Ford Motor Com-

pany, and convert it to your own use? A. We had no authority whatever. Q. Did you do anything of the kind? A. No sir. Q. Whose property, if any did you mortgage to the bank to secure the payment of these notes? A. Mortgaged our own property. Q. Was it property that you owned and had paid for? A. Yes sir. Q. And for which you held receipts in full? A. Yes sir.

The witness thereupon identified certain invoices and drafts some of which have heretofore been referred to, and some of which appear in the Transcript at pages 293 to 299, and others at pages 309 and 313, to 337.

An examination of each of these drafts shows that each recites that it is for property' 'SOLD TO EUGENE FORD AUTO COMPANY" and each is stamped "Paid," and was attached to an invoice of the property sold and paid for by each draft.

WITNESS HATHAWAY says, pages 229-230:

Q. And I will ask you whether or not you paid in full for the Ford automobiles that you mortgaged before you took them from the railroad company? A. According to our contract it was necessary for us to lift the drafts before we received any bill of lading. In fact the Ford Motor Company mailed those drafts to the First National Bank and then in turn the First National Bank notified us that the drafts were there, waiting us. Q. Did the cars come into your possession until you had paid for them? A. No, No.

And at page 231 the witness says: Q. Then after you had bought and paid for the cars, if the amount of merchandise that you purchased from the Ford Motor Company reached certain figures, they sent you back part of your money—is that right—or sent you back a certain rebate? A. Yes sir. It was just a matter of purchasing the cars from the factory; wouldn't make any difference whether they were sold; simply that they were paid for.

WITNESS SNODGRASS (pp. 214-221) (President First National Bank, Eugene) testified in this suit concerning the payment to the bank by Ford Company, stating that neither Winchell nor Hathaway were present at the time of the payment, which was made without their knowledge, so far as Snodgrass knew, by Mr. Godon: that Godon first piad the notes and the note teller cancelled them in the usual way and also cancelled the mortgages, and thereafter the representative of the Ford Motor Company about a week or a month after such payment, at least several days thereafter, returned and requested the bank to cancel the record of payment of the notes and mortgage and to mark such record as an error and give Ford Company a transfer of the notes and mortgage which he refused to do. The witness says (p. 217):

Q. Was there a request made more than once that you alter your records and change that transaction? A. It was made at least twice. Q. At least twice? A. Yes. Q. Did you decline ? A. We declined.

At pages 220-221, witness says that the Ford Company after paying the notes and mortgage and their cancellation requested the bank to change the endorsement, "our paid stamp endorsements on those notes, and to make an assignment of the notes and mortgage," and says (pp. 220-221):

Q. And what was the reason that the bank refused to conform to that request? A. Well, I told them that we had closed the transaction, and that we would not now, after the question had gone into court and been raised, be a party to the changing of our records and be put in that position. Between ourselves and our customers we are in court. The records and the cancellation must stand. Q. Why did the bank accept the money at that time? A. We were acting under the advice of our attorney who knew that there was a controversy, and the question being raised as to the ownership of the cars, and he advised us if they wanted to pay the notes to accept it. Q. May I ask who that attorney was? A. Mr. Bryson, E. R. Bryson, of the firm of Smith & Bryson. * * * Q. That was against the policy of the bank? A. It would be against the policy of the bank to do so without knowing it would be agreeable to our customer. Q. Mr. Bryson, your attorney, was in no way connected, in no way whatever, with Winchell and Hathaway, was he? A. I don't think he was. Q. Or with the Ford Motor Company? A. In no way, as far as I know.

The above testimony refutes any pretense that the mortgages were made by appellants as agents of

the Ford Company, or that appellants received or converted any money of the Ford Company; or that appellants ever mortgaged any property other than property which they had bought and paid for and which had been sold to them by the Ford Company and on which they were entitled to receive and have been allowed the amount of their rebates in the decree although the amount allowed is erroneous.

The payment to the bank was made during litigation and was not made by reason of any privity of contract or relationship or of any legal or equitable duty which Ford Company owed appellant or the bank, or any one else.

The claim in the First Cause of Suit that the mortgages were made as agents of Ford Company is directly contrary to the contract between the parties which says (Tr. p. 10):

"WHEREAS, the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT.

(1.) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiation sales of first party's product to users only, in the methods and upon terms

and within the territory herein specifically set forth.

Powers.

(2.) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

There is no authority given in that contract either directly or impliedly, authorizing the appellants to make mortgages for the Ford Company or upon its property, or to execute notes for or in the name of the Ford Company.

By way of illustration, let us suppose that the automobiles after having been mortgaged had been damaged by fire or theft, so that their value was greatly depreciated and the security thereby had become so diminished that it would pay only 25% of the amount due the bank. Under these circumstances, would the Ford Company be personally liable to the bank for the other 75%? Or, would that Company have stood flat-footed on the provisions of the contract set forth in Par. 22, pp. 18-19?

It is not necessary to argue the above facts as the evidence is uncontradicted. It completely disproves all the alleged equities of the bill. It is noticeable that the lower Court made no findings on any fact alleged in the bill as basis for the alleged equities.

The decree is not supported by any evidence whatever, but is in direct conflict therewith.

The payment to the bank was purely voluntary.

MATTERS OF LAW.

Appellants urge that the decree is reversible as matter of law and that all matters involved in plaintiff's Amended Bill were necessarily part of and were determined in the replevin case, in which they were determined adverse to the Ford Company; and although error was assigned in the petition in error, yet such errors were never ragued, but were abandoned in this Court, and all matters involved in this suit became *Res Adjudicata,* and the Ford Company is estopped from relitigating them.

This contention is based upon the following matters of procedure.

(1) The Amended Complaint in replevin at Paragraph VII alleged a tender of $16,077.50 by an offer to pay $3401.12 to appellants; the difference between said sums is the amount paid to the bank by the Ford Company. This was denied in the answer, and was an issue.

The Complaint therefore brought into this case the question of payment to the bank under this plea of tender.

In the replevin case the question of tender was necessarily involved. The Ford Company asserted rights arising out of contract and not out of clear tort. The contract on which it depended provided how it might be cancelled. (See pp. 48, page 33; and 10-13, pp. 15-16).

If the contract governed the rights of the parties

then it required the Ford Company to make the tender of the 85% paid by appellants for the machines, before the Ford Company could claim possession. Ford Company was required either to prove the actual tender, or circumstances excusing it, or rights arising therefrom. No tender of the money was made or claimed to have been made to appellants, and the only payment made was to the bank. At the trial of the replevin case the Ford Company offered to make this proof, and the record in that case is set forth at page 289 of the Transcript herein as follows: WITNESS GODON:

Q. What was done with this $16,077.50? A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified, through my office in Portland—

MR. SMITH—Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

COURT—I don't think it is material what became of the sixteen thousand.

MR. SMITH—As long as he didn't pay it to us, that is all there is to it.

COURT—As long as it didn't get to the defendants.

Thereafter, and at the close of all the testimony in the replevin case and on motion of attorneys for Winchell and Hathaway, all testimony relating to

the alleged payment to the bank, and the tender, was stricken and the jury instructed to disregard it, and to return a verdict for the defendants. The record shows: (Tr. p. 28):

"Thereupon the defendants made the following motion:

"MR. SMITH—There are two or three motions in relations to the record we want to make to keep the record straight on the evidence . We first move to strike from the consideration of the jury all evidence offered on behalf of the plaintiff as to the payment of the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

And thereupon the Court made the following ruling:

COURT—I think that is well taken as far as constitutes any defense in this case.

To the action of the Court in taking from the consideration of the jury the claim of the plaintiff for the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, the amount of the lien imposed upon the automobiles in controversy by the defendants, the plaintiff duly excepted, which exception was duly allowed.

These rulings of the Court were never reversed;

on the other hand this Court affirmed the lower court.

(2) But even if the Amended Complaint did not involve the question of tender or its excuse or the equities arising out of its performance or non-performance, still the answer in the replevin case (Tr. pp. 263-268) affirmatively alleged the following:

(a) Title. (p. 264)

(b) The dealings between the parties whereby appellants paid the sight draft and bought the property which Ford Company sold them.

(c) A prior settlement of all matters in the complaint, and a relinquishment by the Ford Company of "every claim of possession to the said automobiles and each and every one thereof" (p. 266)

(d) Damages by the malicious and unlawful acts of the Ford Company by taking property of Winchell and Hathaway of the value of $18,555.25 and also by the destruction of their established business to their further damage of $25,000.00.

The damages so alleged greatly exceeded the value of the cars stated in the Amended Complaint (see pp. 261-262).

The Ford Company filed its reply (pp. 270-271) and did not in any manner assert any equity arising out of its payment to the bank, nor did it claim affirmatively any relief whatsoever, because of such payments, although the payment was made June 10, 1916, and the reply was filed July 28, 1916. (Tr. p. 269).

Appellants here argue that at that time the Act of Congress adopting the reformed procedure in actions at law was in force. (See Sec. 1251 B, U. S. Compiled Statutes, 1916, Volume II, Page 2023) and was passed after the adoption of Rule 30, Equity Rules by U. S. Supreme Court (See Vol. III, U. S. Compiled Statutes, 1916, pages 2509-2510, Section 1536).

But whether such amendatory act affected this case or not still the claims in the answer made it incumbent upon plaintiff to set forth its rights in the reply even under the old procedure, because the rights asserted by plaintiff arose out of contract and not clear tort, and the damages and counterclaims set forth in the answer exceeded those claimed in the complaint.

Zimmerman Wells Co., vs. Sunset Lumber Co., 57 Ore. 309; 111 Pac. 690; 32 LRANS 123.

(3) In addition, the Ford Company filed a petition for new trial on Nov. 8, 1916, (Tr. pp. 274-279) and sought (Paragraph IV, page 277) to have the amount paid to the bank credited on the judgment in replevin.

And thereafter filed a second petition for new trial or modification of judgment (Tr. pp. 285-289) again asking the Court to reduce the judgment by the amount paid to the bank.

Each of these motions was overruled on January 2, 1917 (Tr. p. 289), and the rulings involving such motions as well as those involving the instructions

given at the close of all the testimony in the replevin case (heretofore set out) were assigned as error by the Ford Company as Assignment VI and XII (Tr. pp. 280-281). The ruling excluding Godon's testimony was excepted to in the Ford Company's Bill of Exceptions, at Exception No. 11, Subdivision B. (Tr. pp. 281-282).

Although these rulings were duly excepted to and assigned as error yet they were never presented to this Court on the former appeal; therefore they became *Res Adjudicata* by the affirmance of the judgment in replevin.

Ford vs. Winchell, 245 Fed. 850.

(4) In this present suit application was made for preliminary injunction to restrain the collection of the replevin judgment of approximately $22,077.50 with interest and costs until the alleged equities arising out of the payment to the bank could be litigated.

Upon hearing the *Show Cause Order,* the injunction was denied and the preliminary restraining order dissolved. At the time that hearing was held the record consisted of (a) the Bill of Complaint (pp. 3-37); (b) Motion for Order to Show Cause and Temporary Restraining Order (pp. 37-38); (c) moving affidavits supporting the application (pp. 38-40); (d) The Order to Show Cause (pp. 42-43); (e) The Answer (pp. 44-69) which set forth all of the matters here pleaded as *Res Adjudicata* and embraced all the pleadings in the replevin case

with the motion for new trial, and was accompanied by affidavits supporting the motion to dissolve. (Tr. pp. 80 to 91).

At that hearing, the entire record in error in the replevin case was considered by the Court and the order was made dissolving the temporary restraining order and refusing the injunction, *pendente lite.* (Tr. pp. 91-92).

POINTS AND AUTHORITIES APPLIED

Applying the points and authorities heretofore set out to the record in the condition as disclosed above, appellants argue:

I.

TITLE.

The question of Title was directly tendered in the answer in the replevin case; and while ordinarily an action in replevin sounding in pure tort involves the question of possession only, yet, here, the action was founded upon contract, and the defense alleged title by purchase from the Ford Company. The answer, therefore, brought the question of title directly into the case, and the verdict and judgment for Winchell and Hathaway determined that issue, and the affirmance on appeal concluded the question.

Bauer vs. Rynd, (Cal.) 150 Pac. 780.

Furthermore, the facts heretofore discussed and proven anew in this suit under a claim of title, established without contradiction that the title to

the automobiles was in these appellants as matter of fact.

POINTS 2, 3, 4, 5, AND 6.

RES ADJUDICATA AND ESTOPPEL

The importance of this question is apparent from repetition. It arises out of the proceedings in the replevin case and their affirmance, as well as those at the hearing of the temporary injunction.

The entire equities asserted in the original and amended bills are claimed because of the payment to the bank. Appellants argue that such question was necessarily presented by Paragraph VII of the Amended Complaint in the replevin case, as well as by the offer of testimony in support thereof, and the ruling thereon adverse to the Ford Company, both in the offer of evidence and in the proceedings at the close of the testimony, and also by the original and second petitions for new trial and modification of the judgment entered in that case, and again by the Bill of Exceptions and Assignment of Error therein.

It is also urged that even if the complaint did not introduce the equities under the plea of tender, still, the condition of the answer required that such equity be set forth in the reply, and in the absence thereof, all matters relating to the payment to the bank are Res Adjudicata, because they were justiciable under (a) the old procedure as well as (b) the reformed procedure.

Appellants argue that A. C. March 3, 1915, C. 90, 38 Stat. 956 (Section 1251 B, U. S. Compiled Statutes 1916, Vol. II, p. 2023) adopts the reformed procedure in Federal Courts and is directly applicable to the record here presented. That section reads:

> "In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of (and) seeking the relief prayed for. In such answer or plea equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. *In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review is sought by such writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require.*"

This amendment required all equities involved in the plea of tender to be set forth either in the complaint or the reply, in the lower court and also requires a trial *de novo* on the record in the Appellate Court.

The Ford Company has therefore been before two courts, each and both of which could have granted it relief because of its alleged equities. It sought relief in the various ways heretofore shown

in the Lower Court, and was denied recovery there as disclosed by the Record in Error. Thereafter it sought review in this Court and failed to present such claim of alleged equities or the rulings of the Lower Court adverse thereto for adjudication, although the Act of Congress expressly says:

> "Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This act has been construed in the following cases wherein pertinent comment is made.

In *United States vs. Richardson,* 223 Fed. 1010. (4th C. C. A.) Point 3 of Syllabus reads:

> "Act Cong. Mch. 3, 1915, authorizing equitable defenses in actions at law substantially abolishes all technical distinctions between proceedings at law and in equity."

In *U. P. R. Co. vs. Syas,* 246 Fed. 561, (8th C. C. A.) Point 1 of Syllabus says:

> "Under judicial code * * * declaring that in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill, equitable relief may be granted in an action at law, but, in view of Const. Art. 111, Sec. 2, declaring that the judicial power shall extend to all cases in law and equity the act did not in any way except as to procedure, change the essential distinction between law and equity cases in equity being those which in the jurisprudence of England were so called as contradistinguished from cases at common law at the time

of the framing of the Const.; and hence, when equitable relief is asked in an action at law the case for equitable relief should be tried as a case in equity and first disposed of before proceeding in the action at law."

In *Burroughs Adding Mach. Co. vs. Scan. Amer. Bank,* 239 Fed. 179, Point 1 of the Syllabus reads:

"Under Act Mch. 3, 1915 * * * providing that in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing on the equity side of the court, a buyer can plead the equitable defense of fraudulent misrepresentation in an action of assumption against him by the seller for the purchase price of the goods."

In *Maine Northwestern Development Co. vs. Northwestern Commercial Co.,* (9 C. C. A.) 240 Federal 583, (per Ross, J.) Syllabus, Point 1, reads:

"Under judicial code * * * providing that in actions at law equitable defenses may be interposed by answer, that review of the judgment or decree in such case shall be regulated by rule of court, and that 'whether such review be sought by such writ of error or by appeal, the Appellate Court shall have full power to render such judgment upon the record as law and justice shall require' in the absence of a rule of court to the contrary it is not important whether such a case is tried by legal or equitable procedure or whether it is reviewed on writ of error or appeal."

In *Upson Nut Co. vs. American Shipbuilding Co.,* 251 Fed. 707, Syllabus Point 1, reads:

"Where plaintiff sued at law for breach of con-

tract, it was admissable for defendant by cross petition to seek reformation of the contract under judicial code." (Sec. 274-B as added by Act of Mch. 3, 1915.")

These interpretations placed upon the amendment evince a clear purpose on the part of the Courts to give the amendment full scope, viz: to adopt the reform procedure in actions at law and to permit the litigation of a controversy in its entirety although instituted at law.

It is a trite maxim that where equity once obtains jurisdiction of a cause it adjudicates all matters connected therewith and administers complete relief both legal and equitable; and, by the above amendment (Act March 3, 1915) Congress has provided for a complete adjudication of all justiciable rights in actions at law whether such rights are legal or equitable.

At bar, we urge that because the Ford Motor Company asserted its alleged relation with the bank coupled with its tender as set forth of Paragraph VII of the Amended Complaint it brought the entire issue into this case; and, further, that when Winchell and Hathaway sought affirmative relief in their answer, it became the duty of Ford Motor Company to set forth its alleged equities in its reply, even if it had not already tendered the issue in its complaint. We also insist that when the Ford Motor Company sought to prove its right by virtue of such payment to the bank and took exception

to the proceedings shown while the WITNESS GODON was on the stand, and also saved its exception to the instruction given at the close of the testimony in the replevin case, and thereafter presented its alleged equitable claims by way of petition for new trial seeking relief in both its original and second petitions that it placed all its equities before the Court for determination in the former case; and, because of the broad powers given this Court by the amendment the entire replevin action was triable de novo on the record in order that substantial justice might be done.

It is plain that the Ford Company is concluded by the former record.

PROCEEDINGS IN REPLEVIN CASES.

Whether this case is governed by the old or the reformed procedure, the result is the same to the Ford Company.

(a) OLD PROCEDURE. If this procedure be adjudged the correct one, then the Ford Company should have set up its affirmative rights in reply to the answer as the defendants sought damages in excess of those alleged in the complaint.

Zimmerman Wells Co. vs. Sunset Lumber Co., 57 Ore. 309, supra.

(b) THE REFORMED PROCEDURE. In all states which allow equitable and legal relief to be granted in the same action, it is universally held that actions in replevin are under the rule.

Kansas is under the Reformed Procedure, and its decisions apply the rule to replevin cases.

Gardner vs. Risher, 35 Kans. 93.

Miller vs. Thayer, 150 Pac. 157, (*collating* Kansas Cases.

The rule in Kansas was reviewed and sustained by the Federal Supreme Court in

Clement Eustis & Co., vs. Field & Co., 147 U. S. 467; 37 L. 244, (Per Mr. Justice Shiras).

The Syllabus reads:

"In an action of replevin to recover a mill under and by virtue of a chattel mortgage thereon where defendants set up as a defense damages for a breach of a warranty of the mill and for delay in delivering it and was allowed such damages as a set off in that action, he is precluded form bringing a further action for the recovery of such damages and a judgment in the former action is a bar to the subsequent one."

From the opinion we quote:

"The use of a so-called action as a mode of enforcing provisions of a contract in writing seems scarcely consistent with the nature and purpose of that form of action as understood and enforced in England and the older states ofthe Union; but as the Supreme Court of Kansas in the case already cited, has approved of such a proceeding and has likewise held that it is competent for a defendant in replevin to set up as a defense unliquidated damages arising out of a breach by the plaintiff of the contract, and as the plaintiffs in error in the present case themselves resorted to such a defense and obtained its benefit, it was not

error in the Circuit Court of the United States for the District of Kansas to hold that plaintiffs in error were precluded by the verdict and judgment in the replevin suit."

And again the Court says:

"Moreover the record shows that in point of fact the defendants did plead a setoff in the replevin suit and had the benefit of such a plea and it seems to us that they cannot now be heard to say that the plea was not allowed in such a case. *There is high authority for saying that, as the question was a subject of judicial inquiry in the action of replevin, it would not be open elsewhere even in behalf of the plaintiff in replevin against whose contentention the set-off was allowed.*

Bartlett vs. Kidder, 14 Gray, 450.

Merriam vs. Woodcock, 104 Mass. 326.

Other authorities state the rule thus:

Gilbert vs. Husted, 50 *Wash.* 61; 96 Pac. 835; (per Rudkin, J).

"(p. 66) On the merits of the case it is first contended that a counterclaim for damages arising from a breach of the moving contract could not be interposed in this form of action. The two contracts formed a part of the same transaction and must be construed together."

In Ames Iron Wks. vs. Rea, 56 Ark. 450, 19 S. W. 1063, it was held that in an action of replevin to recover goods sold with reservation of title in the vendor until the purchase price was paid, the vendee may in defense counterclaim the damages sustained on account of the vendor's

failure to deliver the goods at the time agreed and tender to the vendor the balance due on the purchase price after deducting such damages; and this rule meets our approval, etc."

In *DeGrott vs. Veldboon* (Wis.) 166 N. W. 662, the right to counterclaim in an action of replevin under the Code is sustained.

In *McCormick Harvesting Mach. Co. vs. Hill,* 79 S. W. 745, 105 Mo. App. 544, it was held that a counterclaim on a money demand may be set up for affirmative relief as well as to defeat plaintiff's claim in replevin.

In *Ramsay & Bro. vs. Capshaw,* 71 Ark. 408, 75 S. W. 479—an action in replevin—the defendant was allowed to recoup damages which he had suffered by loss of profit resulting from plaintiff's refusal to carry out an agreement under which the machinery involved was bought.

In *Collins vs. Leather Co.,* 190 S. W. 990 (Mo. App.) it was held that a plaintiff MUST, IN HIS REPLY, dispute a claim set forth in the answer.

In 34 CYC. 1418—Note 88, and *Townsend vs. Minn. Cold Storage,* 46 Minn. 121; 48 N. W. 682 it is held that counterclaims may be pleaded in replevin actions.

In *Cobbey on Replevin,* 2d Edition, Sec. 1148, we find:

"The judgment in replevin should so far as possible adjust the equities which arise between the parties to the suit in its progress, and in a

suit by the general owner against one who claims a special interest. If defendant's interest in the property expire, or in extinguished after the suit is brought and before judgment, such fact should be shown and considered in rendering judgment, which in such cases should be for costs only. In claim and delivery brought to get possession of property in order to sell it to satisfy a lien, if all the parties are before the court, the court should settle the rights of all parties. As the plaintiff is but a trustee, the value of its interest should be ascertained. In Iowa several replevin suits may be consolidated and tried on equitable principles.

The Supreme Court of Oklahoma has applied the rule under the Reformed Procedure to actions in replevin in the following cases:

Brook vs. Bayles, 6th Okla. 568; 52 Pac. 738.
Bottoms vs. Clark, 38 Okla. 243; 132 Pac. 903.
Stone vs. American National Bank, 34 Okl. 786.
127 Pac. 393.

Emerson-Brantingham Implement Co. vs. Ritter, (Okla.) 170 Pac. 482 reviews all the authorities and adheres to the broad rule announced in Cobbey on Replevin Sec. 88, supra, and *Brook vs. Bayless,* 6th Okla. 568; 52 Pac. 738.

This rule follows the adoption of the reform procedure as a necessity, because courts of equity have always granted complete relief down to the day of trial.

Peck sv. Goodberlatt, 109 N. Y. 180, 16 N. E.
-150.
350.

16 Cyc. 479.
Duessel vs. Proch, 78 Conn. 343, 62 Atl. 152.
Kelly vs. Galbraith, 186 Ill., 593 (610); 58 N. E. 431; (436) Column 2.

In *Randel vs. Brown,* 2 How. 406; 11 L. Ed. 318, the U. S. Supreme Court says:

"* * * for it is the rights of the parties, at the time the decree is rendered that ought to govern the court in rendering the decree."

In *Clement Eustis & Co. vs. Field & Co.,* 147 U. S. 467, 37 L. Ed. 244, the Federal Supreme Court notes a clear distinction between those actions in replevin sounding in clear tort and those arising out of or based upon, contractual relations.

In the contract cases the authorities are unanimous that damages may be recouped, set-off, or counterclaimed, and that all rights under the contract are directly involved.

Here the Ford Company grounded its original replevin action upon a preexisting contract and is therefore clearly under the rule for which we contend.

It was the undoubted intent of Congress by the Act of March 3, 1915, to require the litigation of all rights such as are involved in the relations between the parties to this record, in one controversy and to give the Appellate Court the power to grant complete relief on review whether by appeal or error.

We therefore urge that all matters involved in this suit wherein the Ford Company asserts any equity because of its payment to the bank, were triable in and were within the issues of, the replevin action; and because the Lower Court ruled adversely to the Ford Company's interests in that case and the judgment was affirmed the matters involved in the complaint here are Res Adjudicata.

In 34th Cyc., p. 1418, paragraph 5, the text reads:

> "Waiver of and Estoppel to set up Defense. The general principles of waiver and estoppel are applicable to the question of waiver of or estoppel to set up defenses in actions of replevin."

If we are right in our analysis of the law, then this cause should be reversed with directions to dismiss the bill.

RES ADJUDICATA AS TO DEPOSITS AND REBATES.

We anticipate that opposing counsel will urge that our claims for rebates and deposit money are as much within the rule of Res Adjudicata as the matters alleged in the bill.

As to the deposit money, however, special provision is made in contract, Paragraph 40 (Tr. p. 29), as follows:

> "As a guarantee of the full faithful performance by the second party of all the terms and conditions of this agreement, the second party

In any event, the replevin case involved the question of defendants' right of possession and its value, and if such right could be extinguished by repayment of the 85% price list, it would also be extinguished by payment to the bank of part of such sum and tender or payment of the balance to the defendants.

At the trial the court excluded evidence of payment to the bank upon the objection based solely on the ground that such payment was voluntary—as heretofore argued.

It is plain, therefore, that the matter of payment was involved in the replevin case whether treated as evidence of title or of extinction of defendants' right of possession and the rule of *res adjudicata* applies.

has deposited with the first party the sum of eight hundred dollars ($800.00) in cash, and *it is agreed that the first party may, at its option, apply any part or all of said amounts towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit. if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. ..In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party."*

It is thus seen that the deposit money was not due at the time of the trial of the replevin action nor could it become due until after the final determination of all rights between the parties which could only be fixed on a concluded settlement after the contract was terminated.

The contract provides at paragraph 5, (Tr. pp. 12-13) for damages for breach of territorial restrictions and says:

"For any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of two hundred and

fifty dollars ($250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe for business done, to second party."

On May 24, 1916, Ford Motor Company wired appellants as follows: (Tr. p. 258, Ex. 1.)

"Portland, Oregon, May 24, 1916.

To Eugene Ford Auto Company,
Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Eugene.

FORD MOTOR COMPANY."

Thereafter and prior to the institution of the replevin action an attempt was made to adjust and settle all matters between the parties but Ford Motor Company refused to carry out the settlement. (Tr. in Error, p. .....). Though the contract was cancelled on May 24, 1916, the matter of the application of both the deposit money and the rebates under Paragraph 5, supra, was still at large, and undetermined, and would remain so until a final accounting and settlement between the parties.

By the express terms of Paragraph 40 (Tr. pp. 28-29) of the contract, the

"Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party."

A like provision governs rebates or additional

commissions. Paragraph 29 (Tr. pp. 23-24) of the contract, concludes as follows:

> "If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes enttiled to and shall receive the higher percentage."

The above provisions give the Ford Company the right to retain both the deposit money and the rebates until a final and complete settlement of all matters between it and appellants was made, and to apply such sum to the satisfaction of any or all of its claims arising out of the contractual relation between them.

How, then, can it be held that appellants were compelled, or could elect, to wage their claims for either the deposit money or the rebates until such settlement was had or their rights renounced. There was no settlement, at the time the replevin case was started and tried nor had the Ford Company at that time denied the right of appellant to either the deposit money or the rebates and therefore all rights in relation to both funds were in abeyance and were not subjects for judicial inquiry.

The first requisite of a counter claim is that it shall be DUE at the time it is pleaded. If it is not DUE, it cannot be counterclaimed or set-off or recouped.

We therefore argue that the rebates and deposit money were not due at the time of the trial of the replevin action and were not justiciable questions and hence, could not have been determined in that case.

ADEQUATE REMEDY AT LAW.

The Amended Bill states no fact for equitable cognizance. It seeks nothing but a money judgment. All of the rights purporting to arise in virtue of the payment to the bank were triable at law, before a jury, in an *action* for Money Had and Received.

Vol. 14 Ency. Pl. & Pr. pp. 53-54

Lipman Wolfe & Co., vs. Phoenix Assurance Co., (9th C. C. A., per Gilbert, Circuit Judge.) 258 Fed. 544.

Such an action is applicable in all cases where one has money in his possession which belongs to another and for which the holder gave no consideration.

An examination of the Amended Bill discloses (1) that the purely equitable ground of injunction contained in the original bill was not restated; (2) that the plaintiff did not seek any rights flowing from its pretended right of subrogation such as a mortgage foreclosure or other remedy purely equitable or (3) that plaintiff sought any relief other than a pure money judgment which is laways strictly legal.

We do not admit that plaintiff had a right to maintain either an action or a suit against appellants in any form or forms whatsoever; but we say that if the Ford Company had any rights to recover at all, they arose solely by reason of a double payment and not otherwise.

This was apparently the view of the trial judge as disclosed in his opinion, copy of which is attached hereto, as Exhibit A. An examination of that opinion shows that the trial judge not only falied to find the equities as alleged in the bill but that the recital of facts is with the defendants.

It is therefore urged that this cause should have been transferred to the law side of the Court, and perhaps the complaint recast, and the matter tried before a jury.

In conclusion, we submit that the decree should be reversed and the bill should be dismissed for want of equity and lack of proof and that the amounts awarded to appellants as deposit money and rebates should be increased as to the rebates as heretofore shown.

Respectfully submitted,

ISHAM N. SMITH,
Attorney for Appellants.

Suite 612 American Bank Bldg.,
Seattle, Washington.

Service accepted

..... day of January, 1920.

.....

Attorney for Appellee.

"EXHIBIT A"

—OPINION—

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FORD MOTOR COMPANY, a corporation,
Plaintiff,
vs.
F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix, etc.,
Defendants.

Portland, Oregon, July 28, 1919.

MEMORANDUM by R. S. BEAN, District Judge:

In September, 1915, the plaintiff and defendants entered into a written contract by the terms of which the plaintiff appointed defendants its agent for the sale of automobiles in a designated territory. The contract was to govern all transactions between the parties until July 1, 1916, but by its terms could be terminated or cancelled in the meantime by either party, with or without cause, in which event the plaintiff could at its option retake possession of the unsold automobiles in possession of the defendants, returning to them the deposits thereon. Under the contract plaintiff was to con-

sign automobiles to the defendants from time to time, "to be sold to users only and not for resale upon bills of sale executed" by the plaintiff and "at prices to be fixed by it." The plaintiff was to retain "full title to each automobile until actual bill of sale signed and executed" by it had been delivered to the purchaser. The defendants were to advance to the plaintiff in cash 85% of the list price of the automobile before receiving possession thereof, and to pay the freight from the factory, and to have a lien upon the automobiles for such advances. In pursuance to the contract and prior to May 25, 1916, the plaintiff had consigned to the defendants thirty-six automobiles which were unsold, and upon which defendants had advanced and paid sixteen odd thousand dollars. In order to do so they borrowed from the First Natinal Bank of Eugene twelve thousand odd dollars on their promissory notes, securing same by mortgage on the automobiles. On May 25, 1916, plaintiff cancelled the contract and on June 3, of that year, commenced an action in replevin to recover possession of the automobiles above mentioned, and on June 5th, they were taken from defendants' possession by the United States Marshal under a writ and delivered to the plaintiff, who has ever since retained possession thereof.

On June 10, 1916, the plaintiff, without the knowledge of defendants and without being requested by them to do so, paid to the First National Bank of Eugene $12,676.25, being the amount then due the

bank for money previously borrowed by defendants and secured by mortgages on the automobiles. The notes and mortgages were thereupon cancelled.

Thereafter issue was joined in the replevin action and on September 11, 1916, a trial resulted in a verdict and judgment in favor of defendants for $16,077.50, being the amount advanced by them, and $6,000.00 damages for the unlawful taking thereof, for the reason that plaintiff had not returned or tendered to the defendants the advances as required by the contract. The judgment was subsequently affirmed by the Court of Appeals (245 Fed. 850) and paid by plaintiff.

Thereafter plaintiff brought this suit to be subrogated to the rights of the bank as against the defendants and to recover from defendants the amount paid by it to the bank. The defendants, by their answer deny liability, and also claim a set-off or counterclaim for eight hundred dollars, a deposit made by them at the time the contract was entered into and pursuant to its terms, and the further sum of $1900.60 for commissions earned and unpaid, with interest on each of such items at six per cent per annum from May 25, 1916.

From the above statement it appears that if defendants are permitted to receive and retain the benefit of the payment made by plaintiff to the First National Bank they will have received from plaintiff double payment to that extent of the advances made by them, once through the judgment

in the replevin action, and the other by the payment and satisfaction of their notes to the bank. The defendants claim that the payment to the bank having been made without their request or knowledge was a mere voluntary payment and therefore plaintiff is not entitled to recover from them the amount so paid.

Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the *Boone* case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in the property which it could protect by paying he lien. It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action. Having done so it is, in my opinion, entitled to be subrogated to the bank as against the makers of the mortgage. (37 Cye. 378). The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein, nor was the right of the defendants to recover the deposits made by it or the unpaid commissions involved in such action. The only question in that case was the value of the property taken by the plaintiff under the writ of replevin in case it could not be returned, and damages for such unlawful taking. There is no controversy as to the

amount of the deposit made by the defendants at the time the contract was entered into, and it is admitted that it has not been repaid. The amount of earned and unpaid commission is alleged in the answer to be $1900.60, but the evidence shows the gross amount to be $2325.58 upon which there was a pyament of $987.48 made April 1, 1916, leaving a balance of $1338.10.

I conclude therefore that the plaintiff is entitled to judgment against the defendants for $12,676.38 with legal interest thereon from June 10, 1916, less the sum of $2338.10, with legal interest from May 25, 1916.

No. 3436

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. Winchell, Deceased, and F. M. HATHAWAY as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, co-partners, formerly doing business under the firm name and style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY,

Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the United States District Court for the District of Oregon.

HUGH MONTGOMERY,
PLATT & PLATT,
Attorneys for Appellee,
Platt Building, Portland, Oregon.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. M. HATHAWAY, et. al.,
Appellants,

vs.

FORD MOTOR COMPANY,
a Corporation,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS

On or about the 10th day of September, 1915, the Ford Motor Company, appellee, entered into a contract with a partnership composed of V. W. Winchell and F. M. Hathaway, which did business under the name and style of the Eugene Ford Auto Company.

By the terms of this contract the Ford Motor Company appointed the said Winchell and Hathaway as its agents within certain territory embracing a portion of Lane and Douglas Counties in the State of Oregon.

This agency contract gave to the said Winchell and Hathaway the right to sell Ford automobiles within the specified territory subject to the terms and conditions therein set forth.

The contract provided, amongst other things, that either party might cancel the same with or without cause upon giving to the other party written notice by registered mail.

On the 25th day of May, 1916, the Ford Motor Company cancelled the contract between itself and the said Messrs. Winchell and Hathaway, in the manner outlined therein.

On or about the 3rd day of June, 1916, the Ford Motor Company filed an action in replevin to recover the possession of certain described Ford automobiles which had been consigned to Messrs. Winchell and Hathaway under the terms of said contract.

The theory of the Ford Motor Company in this action of replevin was founded on the premise that under the contract between the Ford Motor Company and the said Messrs. Winchell and Hathaway, the title to all automobiles consigned remained in the Ford Motor Company until their actual sale to the ultimate user.

The replevin action referred to was tried in the District Court of the United States for the District of Oregon, on the 11th day of September, 1916, and a judgment was entered against the Ford

Motor Company, which judgment awarded to the said Messrs. Winchell and Hathaway the amount of their advancements upon the cars sought to be replevined, together with $6000.00 damages.

Upon this trial the Court in effect ruled against the theory of the Ford Motor Company, according to which it contended that the title to all cars consigned under the contract remained in itself until the sale to the ultimate user, and also held that it had failed to make out a technical case of replevin.

This replevin case was appealed to the Circuit Court of Appeals for the Ninth Circuit, and was there affirmed, upon the theory that the Ford Motor Company had omitted the performance of the statutory conditions necessary to be performed in order to maintain an action of replevin.

This case is reported in 245 Fed. 850.

Prior to the appeal of the replevin action referred to there had been instituted an action by one Benjamin E. Boone against the Ford Motor Company, which proceeding questioned the right of the Ford Motor Company to cancel its agency contracts, as therein provided, and likewise questioned the validity of the provisions of the contract reserving title in the Ford Motor Company until such time as the automobiles delivered under the contract reached the hands of the ultimate user.

In this latter case, the United States District Court held against the contentions of the Ford

Motor Company, and the case was eventually appealed to the Circuit Court of Appeals for the Ninth Circuit, which court reversed the decision of the lower court, and held that the agency contract used by the Ford Motor Company was a valid and binding contract, and sustained its provisions.

This latter case is reported in 244 Fed. 335.

The contract involved in the case last referred to was identical with the contract involved in the case of Ford Motor Company vs. Winchell and Hathaway, and consequently identical with the contract involved in the present controversy.

The effect of the decision in this last case was to hold that the title to cars consigned under the agency contract between the Ford Motor Company and Messrs. Winchell and Hathaway did not pass from the Ford Motor Company upon the delivery of the cars to its agents, and that, therefore, if the contract was cancelled between the date of the delivery of the cars to the agent, and the sale thereof to the ultimate user, the title would be in the Ford Motor Company at the time of cancellation.

At the time when the automobiles involved in the replevin action referred to were delivered to Messrs. Winchell and Hathaway, the said Messrs. Winchell and Hathaway procured from the First National Bank of Eugene, Oregon, a loan of money to lift the bills of lading outstanding upon the machines consigned, and delivered to the said First National Bank of Eugene, Oregon, chattel mort-

gages upon the machines in controversy in the said replevin action to secure the payment of the loan referred to.

In connection with the institution and maintenance of its replevin action and in order to relieve the title to the cars therein involved from the lien created by these chattel mortgages, the Ford Motor Company paid to the First National Bank of Eugene, Oregon, the sum of $12,676.25, being the balance due upon the notes secured by these chattel mortgages, and thereby procured a cancellation of the notes and mortgages.

After the replevin action was decided in favor of the said Messrs. Winchell and Hathaway, and the sum of $22,077.50 awarded to them, which amount was composed of $16,077.50 as the value of the cars, and $6000.00 damages, the Ford Motor Company sought to procure from Messrs. Winchell and Hathaway by way of offset, or otherwise, the sum of $12,676.25, which it had paid to the First National Bank of Eugene, Oregon, to secure a release of said cars from the lien of said chattel mortgage.

Messrs. Winchell and Hathaway refused to pay to the Ford Motor Company the said sum of $12,-676.25, or to allow to the Ford Motor Company any credit for said amount of money upon the accounts between them, and the Ford Motor Company was compelled to pay to Messrs. Winchell and Hathaway the full amount of said replevin judgment.

For this reason the present suit was instituted

to recover from Messrs. Winchell and Hathaway and the Eugene Ford Auto Company the said sum of $12,676.25, by having the Court decree that the Ford Motor Company is entitled to be subrogated to the First National Bank of Eugene, Oregon, as against the makers of the chattel mortgage referred to.

To the complaint filed by the Ford Motor Company, the appellants filed an answer setting up generally the history of the transactions between the parties as above outlined, and alleging that the payment to the First National Bank of Eugene, Oregon, was a voluntary payment without the consent of the said Messrs. Winchell and Hathaway and that, therefore, the Ford Motor Company was not entitled in law to be indemnified against said payment or any portion thereof, and further set up certain counter-claims in the form of unpaid rebates alleged to be due to the said Messrs. Winchell and Hathaway.

The Ford Motor Company filed a reply making an issue as to the amount of rebates alleged to be due.

Upon the issues thus joined the question presented to the lower court for decision and now presented to this Court for review upon appeal is as follows:

Should the appellants be allowed to retain the sum of $12,676.25, which they received from the First National Bank of Eugene, Oregon, and at the

same time retain the benefit derived from the payment of this very sum to the First National Bank of Eugene, Oregon, by the Ford Motor Company, which payment was made by the Ford Motor Company to relieve the machines involved in the replevin action from the lien of a mortgage created by the appellants?

In other words, should the appellants be allowed to receive and enjoy the double payment of the sum of $12,676.25?

The trial court held that the appellants should not be entitled to a double payment of this sum of money, and that the Ford Motor Company was entitled to be subrogated to the bank as against the makers of the mortgages.

The entire brief submitted on behalf of the appellants is devoted to an attempt to establish that the appellants are entitled to retain the sum of $12,676.25, although they have neither given nor paid any consideration therefor.

It is, therefore, apparent from a mere statement of this case that the equities are strongly against the appellants and we shall endeavor to point out from the record here presented that the decree entered by the lower court is justified by the law and the facts.

ARGUMENT

It is admitted in the case at bar that the appellee paid to the First National Bank of Eugene, Oregon, the sum of $12,676.25 in satisfaction of certain notes and chattel mortgages, which the appellants had given to said bank, and which mortgages constituted a cloud upon the title to the Ford automobiles which were involved in the replevin suit instituted by the appellee against the appellants.

Under the provisions of Section 13 of the Agency contract between the Ford Motor Company and Messrs. Winchell and Hathaway the latter had an equitable lien upon each automobile consigned under said contract to the extent of eighty-five per cent. of the purchase price advanced.

This section of the contract appears at the bottom of page 15 of the transcript of record, and reads as follows:—

> "Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same, and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss."

It, therefore, follows that at the time when Messrs. Winchell and Hathaway placed the chattel

mortgages upon the automobiles consigned to them to secure the payment of their notes to the First National Bank of Eugene, Oregon, in the sum of $12,676.25, they had an equitable interest or lien upon the automobiles, which they could mortgage to the bank, and it was for the purpose of relieving the title to the automobiles from such equitable lien that the appellant paid this amount to the bank.

It furthermore appears that at the time when the chattel mortgages under discussion were placed upon the automobiles involved in the replevin action that Messrs. Winchell and Hathaway were still the agents of the Ford Motor Company under the existing contract, and when the Ford Motor Company paid the $12,676.25 secured by these mortgages to the First National Bank of Eugene, Oregon, for the purpose of relieving the title to the cars from the equitable lien referred to, it recognized, in effect, that its agents in possession had imposed upon said automobiles an equitable lien which could be enforced by the Bank of Eugene, even though it could not be enforced by Messrs. Winchell and Hathaway, because the bank had obtained said lien for value, erroneously believing the legal title of the cars to be in Messrs. Winchell and Hathaway (see page 218, Transcript of Record), and the Ford Motor Company further recognized that such cloud on its title would have to be removed in order to enable it to perfect its replevin action.

Instead of taking legal steps to remove such cloud the Ford Motor Company adopted the shorter method of making the payment in controversy.

Mr. F. C. McDougal, a witness called on behalf of the appellee, after testifying that he was one of the attorneys for the Ford Motor Company at the time of the institution of the replevin action, was asked the following question:—

> Q. Now, in connection with that proceeding a payment was made, if you recall, to the First National Bank of Eugene, Oregon, of the sum of $12,676.38. I wish you would state the reason and purpose of making that payment by the Ford Motor Company.

Objection by Mr. Smith.

> A. Well, it was for the—the payment was made to the bank for the purpose of relieving this lien which the firm of Winchell and Hathaway had placed upon the automobiles in the way of a mortgage.

(Transcript of Record, p. 222.)

Mr. P. E. Snodgrass, one of the witnesses called on behalf of the appellants, after testifying that he was president of the First National Bank of Eugene, Oregon, and further testifying that he had knowledge of the circumstances surrounding the payment to the said bank of the $12,676.25 in controversy, was interrogated upon cross-examination as follows:—

> Q. Now, Mr. Snodgrass, when you said that this loan was made upon the individual

credit of Messrs. Winchell and Hathaway—I understood you to say it was. That is correct?

A. Yes, sir.

Q. Then, why was it necessary for the bank to take a chattel mortgage on these cars?

A. That would be additional security.

Q. Additional security to the credit of Winchell and Hathaway?

A. In addition to their personal credit same as we frequently take security from people that we loan to.

* * * * *

Q. I also understood you, didn't I, that you really don't know whether or not they objected to the payment of this amount—that is Messrs. Winchell and Hathaway?

A. They didn't make any objection to the bank. I am sure they made no objection.

Q. Has the amount evidenced by these notes and mortgage ever been paid to the bank by Messrs. Winchell and Hathaway in addition to the payment made by the Ford Company?

A. It has not.

Q. Then, in so far as the records of the

bank show, and in so far as the real facts are, Messrs. Winchell and Hathaway have received some twelve thousand odd dollars—the exact amount I have not just before me; whatever the amount of the payment of the Ford Motor Company was—from the bank as a loan and likewise received the benefit of the payment to the bank by the Ford Company. That is a fact, is it not?

* * * * *

A. The amount as evidenced by the notes was advanced to Hathaway and Winchell. The notes were paid by the representatives of the Ford people, and the bank has not received any other payment.

* * * * *

Q. Now, just how soon after the payment of these notes by the Ford Motor Company, or the money that was tendered to the bank and accepted by the bank, did they come back and make this request on you which you have referred to for a change of the bank's record?

A. Well, I couldn't tell you the exact number of days or weeks. As near as I can remember it will be several days, perhaps a month or even more.

Q. I was not quite clear in your direct testimony, or I did not quite understand the exact statement which you say was made to the Ford

Company at that time. Will you restate that, please, with reference to the changing of your records. What was the request?

A. They requested that we change our endorsement our paid stamp endorsements on the notes.

Q. To what?

A. And make a transfer of the notes to them instead of cancellation of the notes.

Q. That is an assignment of the notes and security to the Ford Motor Company?

A. An assignment of the notes to the Ford Motor Company instead of cancellation of the notes as paid.

Q. And likewise an assignment of the mortgage?

A. Yes.

Q. And what was the reason that the bank refused to conform to that request?

A. Well, I told them that we had closed the transaction and that we would not now, after the question had gone into court and been raised, be a party to the changing of our records and be put in that position. Between ourselves and our customers we are in court. The records and the cancellation must stand.

Q. Why did the bank accept the money at that time?

A. We were acting under the advice of our attorney who knew that there was a controversy, and the question being raised as to the ownership of the cars, and he advised us if they wanted to pay the notes, to accept it.

(Transcript of Record, pp. 217-221.)

It is also admitted by the record in this case that the contract under which the parties operated and which is set forth on pages 9 to 36, inclusive, of the transcript of record, is in effect the same contract which was construed by this court in the case of Ford Motor Company vs. Benjamin E. Boone, **244 Fed. 335,** in which case the validity of said contract was upheld and said contract was construed as leaving the title to all cars consigned thereunder in the Ford Motor Company until the same were finally sold to the ultimate user.

The above record establishes that the payment of the $12,676.25 to the First National Bank of Eugene, Oregon, was made by the Ford Motor Company for the purpose of aiding its replevin action, by relieving the title to the cars sought to be replevined from the equitable lien created thereon by Messrs. Winchell and Hathaway, and the purpose and intention of the Ford Motor Company in making this payment is positively established by its act in returning to the bank, and seeking to procure from the bank, an assignment of the notes and security

so as to keep alive, as against Messrs. Winchell and Hathaway the obligation which they had imposed as a cloud upon the property of the Ford Motor Company.

The testimony of the bank's president in this particular is doubly convincing because it comes from the lips of the appellants own witness.

In view of this record, we respectfully submit that the act of the Ford Motor Company in paying the $12,676.25 was not the act of a volunteer paying the debt of a third party in which it had no interest.

The finding and conclusion of the trial court upon this branch of the case, which is the main question involved, is so clear, concise and accurate that we here quote it as the correct and only rule applicable to this appeal:—

> "Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the Boone case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in the property which it could protect by paying the lien. It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action. Having done so it is, in my opinion, entitled to

be subrogated to the bank as against the makers of the mortgage. (37 Cyc. 378)."

(Brief of appellants, p. 59.)

The only answer offered by the appellants to the above record and the above finding and conclusion of the trial court is that the matters involved in this case could have been tried and determined in the action of replevin between the same parties, and they cite a number of cases, as well as the new Federal statute authorizing the interposition of equitable defenses in actions at law, as the basis of their contention.

An examination, however, of the record in this case as well as the transcript of record in the case of Ford Motor Company vs. E. A. Farrington, et. al., which was introduced in evidence as "plaintiff's exhibit 3," and which pursuant to a stipulation of the parties, has been transmitted for use upon his appeal, will disclose that upon the trial of the replevin action the Ford Motor Company endeavored to present for determination the question of its right to recover the $12,676.25 in controversy, but that that question was expressly eliminated from consideration in the case by the ruling of the court, and that such ruling was based upon the motion and objection of Mr. Isham Smith, who now appears as attorney for the appellants in this case, and urges that this same matter, which he himself eliminated from the replevin action, cannot now be considered because it should have been adjudicated in that case.

These rulings and motions appear upon pages 175, 202, 301, and 314 of the transcript of record in the case of Ford Motor Company vs. E. A. Farrington, et. al., introduced in evidence in this case, and transmitted to this court as "plaintiff's exhibit 3."

In view of the above record, and in view of the further fact, (as shown by the testimony of Mr. Hugh Montgomery appearing upon pages 211 and 212 of the transcript of record) that the Ford Motor Company was compelled to pay the full judgment in the replevin action without obtaining any satisfaction of its claim for the $12,676.25, the trial court concluded as follows:—

> "The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein, nor was the right of the defendants to recover the deposits made by it or the unpaid commissions involved in such action. The only question in that case was the value of the property taken by the plaintiff under the writ of replevin in case it could not be returned, and damages for such unlawful taking."
>
> (Brief of Appellants, page 59.)

We respectfully submit that the above rule is the only rule which is properly applicable to the facts of the case at bar, and that the peculiar facts of the case at bar, and particularly the act of the appellants in excluding the subject matter of the present controversy from consideration in the replevin

action, distinguishes the present case from all of the adjudications cited by the appellant in support of its contention that the present controversy should have been disposed of in the prior replevin action.

This disposes of the two main propositions advanced by the appellants to the effect that the payment of the $12,676.25 was a voluntary payment, and that the subject matter of the present controversy should have been determined in the prior replevin action.

In addition to these main contentions the appellants have advanced two minor propositions, in substance as follows:—

First, that the record does not show that the title to the cars involved in the replevin action was in the Ford Motor Company, and **Secondly,** that the trial court made an improper allowance on the subject of rebates.

The first contention is disposed of by the fact that the contract between the parties, as construed by the Circuit Court of Appeals in the case of Ford Motor Company vs. Benjamin E. Boone, 244 **Fed.** 335, reserved title to the cars in the Ford Motor Company, and the further fact that Mr. F. M. Hathaway, one of the appellants in this case, testified as shown on page 232 of the transcript of record, that the Ford automobiles involved in the present controversy were purchased under this very form of contract.

The second proposition referred to, involving the subject of rebates, complains of the fact that the court credited the Ford Motor Company with a check in the sum of $987.48, which was issued prior to the institution of the replevin case, but the check referred to, as shown by the testimony of Mr. George W. Alling appearing upon page 236 of the transcript of record, was credited on the entire account involving the subject of rebates between the Ford Motor Company and Messrs. Winchell and Hathaway, and it appears that this rebate account was a general account covering the entire contract period and not a specific account covering the cars involved in the replevin case.

In addition to this criticism of the court's allowance, the appellants now attempt, as shown on page 22 of their brief, to assert that the court made another error in not figuring the entire amount of rebate money due as $3,401.12 instead of $2,325.58, as shown by the testimony of Mr. Alling upon page 236 of the transcript of record.

This latter criticism of the trial court's ruling is based upon some transposition of figures found in the original record of the replevin case, but the inaccuracy of the appellants' criticism in this particular is established by the fact that in their own answer filed in the present case they claim as the amount of rebates due the sum of $1,900.60, (see prayer of answer, page 161, transcript of record), whereas in their brief they claim as the amount due the sum of $3,401.12 less a draft of $987.48. (See brief of appellants, page 22.)

We respectfully assert that there is no evidence in the record to support this last contention of the appellants, and the only evidence directly bearing upon this question is the testimony of Mr. Alling, the accountant of the Ford Motor Company, appearing upon pages 235 and 236 of the transcript of record, and according to this testimony the total amount of rebates due at the date of the trial of this case as shown by the records of the Ford Motor Company was $2,325.58 less $987.48.

These were the figures used by the trial court as shown in the last paragraph of his decision, and by these figures the trial court gave to the appellants $424.98 more by way of rebates than was called for by the prayer of the appellants' answer.

We, therefore, urge that the appellants are in no position to complain regarding the court's action in this particular.

Very respectfully submitted,

HUGH MONTGOMERY,
PLATT & PLATT,
Attorneys for Appellee.

No. 3436

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. M. HATHAWAY, et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

ISHAM N. SMITH,
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IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. M. HATHAWAY, et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Apellee's Brief brings in sharp outline the following questions:

Question 1: The validity of the contract.

Ford Company urges that this Court has sustained its contract in

Ford Motor Company vs. Boone Company, 244 Fed. 355, decided November 1, 1917.

There the decision was not based upon the practical transactions between Ford Company and its agents.

However, the Sixth Circuit Court of Appeals in Ford Motor Company vs. Union Motor Sales, 244 Fed. 156, decided October 25, 1917, held the contract void for conflict with the anti-trust laws:

One main difference noted in these cases relates to the clauses concerning rebates. This Court, through Judge Dietrich, says:

(244 Fed., 339): "It is to be admitted that the plaintiff, before parting with possession of its cars, requires the payment by the consignee of the entire money consideration which it expects to receive. Indeed, *if the aggregate of the sales consummated by the consignee in a year* exceeds a certain amount, the plaintiff is under obligation to return to it a part of the advance payment by way of commissions."

The Sixth Circuit Court of Appeals took the opposite view of this question. It said (244 Fed., 158):

"For example: Plaintiff agrees to sell 'its product to the dealer licensee' at certain discounts from list prices and to allow certain additional rebates scaled on the 'net amount of business' done, *which plainly means the amount of the dealers' purchases from the plaintiff;* the dealer agrees to take deliveries and to 'purchase the said Ford automobiles' in various months specified."

The testimony of Witness Hathaway heretofore quoted (our opening Brief, top of page 17) shows that the Ford Motor Company did business as the Sixth Circuit Court of Appeals said, namely: It allowed rebates on amounts of purchases from it and did not confine them to resales.

Furthermore, the drafts accompanied by bills of lading are *bills of sale for net cash,* and the contract at clause 7 (Tr., page 13) reads:

"(7) Second party shall arrange all sales of Ford automobiles for cash only; but if the second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own

account solely, and he must remit cash only to first party."

That clause gives direct authority to the agents to sell on whatsoever terms they may see fit, provided only that Ford Company is paid its money. This was done before the cars were unloaded.

These facts show that aside from the words of the contract the transaction between Ford Company and appellants was one of sale and not of bailment, and that title passed, and that the parties by their course of conduct made their transactions one of purchase and sale and not of bailment, as heretofore urged.

If this view is correct, this case must be reversed because the mortgages were Winchell and Hathaway's mortgages on their own property and Ford Company was a volunteer in making the payment within the meaning of

Parker vs. Lancaster, 84 Maine 515, 24 Atl. 952.
Ash vs. McClellan, 62 Atl. 598.
Dickerson vs. Lord, 89 Am. Dec. 579.

Judge Bean's opinion does not consider this fact of rebates on unsold cars; but to us it seems one of the crucial points of the case.

Ford Company knew the limitations placed upon its own "agents"—and their want of power to mortgage Ford Company's property as well as to assign the pretended *"lien."* That company also knew of its course of dealing with these appellants, as heretofore shown.

Question 2. Were the mortgages valid? Was Ford Company compelled to pay them?

If title to the machines passed to appellants then Ford Company was not affected by the lien thereby created.

If such title never passed, then such mortgages were void as to the Ford Company (Bailor) and their payment was a voluntary act.

The contract (if valid) created a personal, non-transferable, limited and prescribed agency. Ford Company exercised its right of personal selection—delectus personarum—in choosing its agents; that right of selection was one of which Ford Company could not be deprived.

Suppose the bank had foreclosed the mortgage; could it by becoming the purchaser at the sale, be substituted as the sales agent in place of Winchell and Hathaway? Could it transfer title to purchasers under clause 7 of the contract? Exactly what interest or lien upon the machines would the First National Bank sell if it should foreclose? And again, if the bank should have foreclosed, would the sale be public? Could Dodge Bros. Company or the Maxwell Company or the Studebaker Company or any other rival of the Ford Company buy in the interest sold under the mortgage foreclosure and thereby become the agents of the Ford people?

This contract is either one of sale or bailment. There is no middle ground. If of sale, then title passed to appellants, and the case must be reversed; but if of bailment, then Winchell and Hathaway had no power whatsoever other than that expressly conferred, and any attempt on their part to deal with the property in any way other than in strict compliance with the terms of the bailment, was wrongful and would render them and the bank both liable.

Such, in fact, is the plain expression of the contract. See Par. 15, Tr. p. 12; Par. 16, Tr. p. 16; Par. 27, Tr. pp. 22-23. See also

Shank vs. Saunders, 13 Gray (Mass.) 37.
Dunlap vs. Gleason, 16 Mich. 158.

93 Am. Dec., 231, says:

"The bailment by its terms imports a personal trust which could not be transferred."

See *Norris vs. Boston Music Co.,* 151 N. W. 971, holding that bailor can pursue and recover property even in hands of purchaser in good faith.

6 C. J. 1147-48. Paragraphs 3 and 4—text.

Therefore, Winchell and Hathaway could not mortgage the property if it belonged to Ford Company, nor could they transfer or assign their alleged or pretended lien. Such act renders them and the bank both liable either in replevin or conversion.

24 R. C. L. 488, Sec. 781, note 19-20.

Wood vs. Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

Ivers & Pond vs. Allen, 8 Ann. Cas. 129, note.
24 R. C. L. 792, p. 500.

The fact is that Ford Company should have joined the bank as defendant in this replevin case because a bailee for sale has no right to mortgage.

Thirlby vs. Rambow, 93 Mich. 164, 53 N. W. 159.

Ford Company's brief in this case concedes that there was no necessity for paying these mortgages. From the bottom of page 11 of Appellant's Brief we quote:

"Instead of taking legal steps to remove such cloud the Ford Motor Company adopted the shorter method of making the payment in controversy."

Such payment is entirely voluntary and can afford no basis for subrogation.

It is plain that Ford Company (if title to the cars

remained in it) was under no duty to pay the indebtedness secured by the mortgages; but that it could have removed the pretended lien by any of the following methods:

(1) By joining the bank as a defendant in the replevin action.

(2) By suit against the bank and appellants compelling them to wage their claim against each other.

(3) By action of conversion against the bank, thereby compelling that institution to pay the Ford Company the entire price of the cars. This would make the bank pay the Ford Company instead of Ford Company paying the bank.

(4) By setting out its alleged and pretended equities in its reply in the replevin case.

Appellant's Brief at page 16 says:

"The above record establishes that the payment * * * was made by the Ford Motor Company for the purpose of aiding its replevin action by relieving the title to the cars sought to be replevined from the equitable lien created thereon by Messrs. Winchell and Hathaway, etc."

Judge Bean did not find that Ford Company was compelled to pay the indebtedness to get rid of the lien. He says:

"(Appellant's Brief, Exhibit A, page 59.) Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the *Boone* case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in

the property which it could protect by paying the lien. *It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action.* Having done so it is, in my opinion, entitled to be subrogated to the bank as against the makers of the mortgage. (37 Cyc. 378.)"

Judge Bean did not hold that the Ford Company paid the indebtedness as a matter of *necessity* or of compulsion. He held only that Ford Company "believed that it was necessary, etc."

The opinion, as well as appellant's brief, says that the payment was made in aid of the replevin case, thus establishing the necessity of setting forth all rights claimed to arise from such payment, in the reply.

By this method all questions involved in this case would have been drawn into and become an integral part of the replevin action.

A reply setting up these alleged equities of the Ford Company would necessarily embrace the questions of the validity of the mortgages, the amount paid by Ford Company, the necessity of such payment, the character of the lien (if any) which the bank acquired and the entire relation involved in this suit.

Judge Bean's opinion was controlled by the Boone case supra; he disregarded the facts showing that title passed by the course of dealing, as heretofore shown, and therein committed error.

Question 3. The Amount of Rebates.

The question of rebates shows the following situation:

1. The answer claimed $1900.60;

2. The court found $2325.58, but deducted the draft, erroneously, as we think;

3. The testimony of Witness Norman (Trans. 303-6) showed rebates of $3401.12.

Appellee's Brief says (page 21) that our argument is based upon some *"transposition of figures."* This contention is not true. Witness Alling (Trans. 235-6-7 et seq.) says:

"A. We figure a balance due of $1338.10.

"Q. A balance due of how much?

"A. Balance due as rebate of $1338.10.

"Q. Please advise the Court how you arrive at that computation.

"A. The total rebate due, as we figured it, was $2325.58, of which they were paid $987.48, leaving a balance as I figure it of $1338.10.

"THE COURT—Leaving a balance of what?

"A. $1338.10.

"COURT—How do you arrive at that conclusion? *How many cars did they purchase?*

"A. *Those figures have not all been added together.*

"Q. Have you a copy of that typewritten statement showing this computation you showed me yesterday?

"A. None other than this.

"Q. I thought you had a typewritten computation yesterday attached to the letter.

"A. Only the totals of one hundred and sixteen cars.

"THE COURT—One hundred and sixteen? How many do these receipted bills show?

"MR. SMITH—We are claiming one hundred and seventy-nine.

"THE COURT—I know, but I do not know whether you have checked up these receipted bills.

"MR. HARDY—Some of these receipted bills were offered in evidence at the former trial showing a continuing custom of doing business.

"THE COURT—Never mind. If you have not checked them up it does not make any difference."

This testimony shows that Alling admits that his computation did not include all of the cars.

By taking the 179 cars claimed by us at the rate allowed by Alling we find the following computations: 116 cars: 179 cars ::$2325.58;x—the result is $3593.61, and their own witness, Norman, at the record quoted supra admits $3401.12. The Court's error is obvious.

The testimony of Ford Company was not sufficient to show that the $900.00 check should be credited on the amount admitted even by Alling.

Appellee says that we were allowed more than we asked; but in this suit in equity all the parties were before the Court.

Question 4. Voluntary Payment.

Appellee's Brief (pages 8 and 9) states a theory of recovery not involved in either cause of suit. It argues that Winchell and Hathaway got money twice as follows:

a. From the bank on the mortgage;

b. By the payment to the bank.

If those mortgages were made as agents of Ford Company, as set forth in the first cause of suit, then Ford Company simply paid its own debt.

Appellee's Brief (pages 6 and 8) admits that the money obtained from the mortgages was paid to Ford Company. Therefore that Company received the money from the bank and paid the money back to the bank. If appellee's theory is correct the Ford Company paid its own debt, not ours.

Question 5. Were all matters involved here, justiciable in the replevin case?

Appellee's Brief does not controvert our position either as to facts or law on this point. On the other hand, their brief (page 16) says, in reference to the payment:

> "The above record establishes that the payment of the $12,676.25 to the First National Bank of Eugene, Oregon, was made by the Ford Motor Company FOR THE PURPOSE OF AIDING ITS REPLEVIN ACTION BY RELEASING THE TITLE TO THE CARS SOUGHT TO BE REPLEVINED FROM THE EQUITABLE LIEN CREATED," etc.

Their only claim against our argument is made at page 18 of their brief, wherein they say that the fact which distinguishes this case from all others is that appellant's attorney (Isham N. Smith), "who now appears as attorney for appellants in this case and urges that this same matter which he himself eliminated from the replevin action, cannot now be considered because it should have been adjudicated in that case."

The objection in the replevin action was not based upon procedure or any technical ground; but because the payment was purely "voluntary." This objection was sustained by the Court; an exception was noted by the Ford Company, the exception was preserved in the Bill of Exceptions and specified as error, and thereafter was not argued or presented to this Court and hence was waived.

At the argument on appeal in the present case Ford Company sought to give the impression that the objection to the testimony last referred to was on technical grounds of procedure. That company did not so understand the objection at the time it was made. If the objection was solely on grounds of procedure, then Ford Company would never have preserved its record in error on the ruling.

Furthermore, there is neither pretense nor claim that any position of Winchell and Hathaway's attorneys prevented or dissuaded or misled the Ford Company's attorney into failure to set out its pretended rights in the reply, and this is the fatal point.

That reply was drawn after the payment was made. The Act of Congress was in force almost one year before this case was filed. The failure to set forth all equities in the reply is directly contrary to the requirements of the Act of Congress, as heretofore shown.

Under the state of the pleadings, objection on procedural grounds along might properly have been made. We did not seek adjudication as to form or method, but as to substance, and we believe that the question of the payment to the bank was directly involved in the replevin case, because

(1) The character of that payment, whether voluntary or otherwise, was raised by our objection;

(2) The amount of the payment was necessarily embraced in the question of,

(a) Winchell and Hathaway's interest in the property;

(b) The value of the right of possession;

(c) The right of possession as an abstract question;

(d) Tender;

(e) The change of relation pendente lite;

(f) The character of lien (if any) which the bank acquired.

But, barring all these, if Ford Company is right in its contention that it made the payment by necessity—and not by choice—it has the legal remedy of money had and received. Its resort to equity was unavailing.

At page 19 of its brief appellee quotes from the opinion of Judge Bean as follows:

> "The only question in that case was the value of the property taken by plaintiff under the writ of replevin, in case it could not be returned, and damages for such unlawful taking."

This shows that the value of Winchell and Hathaway's interest was directly involved in the replevin case. The original complaint alleged the value at over sixteen thousand dollars; the amended complaint alleged the value at a little over thirty-four hundred dollars; the jury returned a verdict for over sixteen thousand dollars as the value of our property and the question of the payment to the bank was directly involved in fixing the extent of our property.

At the top of page —— of Ford Company's Brief it is said that "It is admitted in this case that * * * mortgages constituted a cloud upon the title," etc.

Enough has been said to show that our admission of the validity of the mortgages is contingent upon our ownership of the property.

We submit that the Ford Company has had its day in court and that the decree should be reversed.

Respectfully submitted,

ISHAM N. SMITH,
Attorney for Appellants.

No. 3436

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased; and F. M. HATHAWAY as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

Upon Appeal from the United States District Court for the District of Oregon.

ISHAM N. SMITH,
421 Mohawk Building,
Portland, Oregon,
Attorney for Petitioner.

No. 3436.

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

Appellants' Petition for Rehearing.

While ordinarily, the value of a petition for rehearing is best expressed by the algebraic quantity "X," yet we believe that a rehearing should be granted in this case, notwithstanding the evident care and consideration which it has already received.

Based upon the opinion and the record, we urge the following grounds as reasons for rehearing:

This Court erred,—

First: In failing to distinctly construe A. C. March 3, 1915, C. 90, 38, Stat. 956; Judicial Code, sec. 274 B (sec. B, U. S. Comp. Stats. 1916, Vol. 2, p. 2023).

Second: In failing to decide whether that Act adopts the reform procedure in actions at law.

Third: In holding and deciding (bottom p. 4, top p. 5 of Opinion) that the general rules of pleading a setoff and/or counterclaim apply to the facts at bar.

Fourth: In deciding that,—

"The payment was made in good faith under circumstances which justified it, etc."

Fifth: In deciding that,—

"The appellee's payment to the bank was not expressly or impliedly involved in, *but was entirely independent of the question of title or right of possession of the subject matter of the replevin action and the issues therein,* and the appellee's demand therefor is not merged in the judgment."

Sixth: In deciding that,—

"We need not pause to inquire whether the appellee's demand was pleadable as a counterclaim in the replevin action. We think it very clear that wholly aside from that question, the judgment in the replevin action was not *res adjudicata* in the present suit."

Seventh: In failing to hold that statutes permitting equitable defenses to be pleaded in an action, do not preclude resort to suits, to protect such equities.

These assignments of errors will be discussed hereafter.

In addition, we urge the following points:

Point 1. If the contract (Tr., pp. 9–35) be construed as Ford Company contends it should, then it creates a nonassignable, nontransferable personal relationship, and the attempt of Winchell and Hathaway to mortgage their lien is a nullity.

16 R. C. L., p. 282, sec. 323 (5).

Meyer vs. Livesley, 45 Or. 487 (489), 78 Pac. 670, 106 A. S. R. 667.

Meyers vs. Roberts, 50 Or. 81 (84), 126 A. S. R. 733, 15 Ann. Cas. 1031, 12 L. R. A., N. S., 194.

Point 2. The contract, at clause 15 (p. 16), clause 6 (p. 13), and clause 22 (pp. 18–19) is utterly inconsistent with the idea of a consignment of sale, and is consistent only with an absolute sale.

Point 3. Statutes which provide that equitable defenses *may* be interposed at law are universally held to prohibit the maintenance of a suit after judgment at law, based upon such equity, because the remedy is in the law action.

Point 4. The adequacy of a remedy at law has always been held to defeat jurisdiction in equity.

ARGUMENT.

THE PLEADINGS—PROCEDURE.

The authorities cited at pp. 4–5 of the Opinion relate to the general law and not to statutes governing the pleading of an equitable setoff or counterclaim in actions at law, and this Court so holds. It says:

> "The case comes within the general rule, and in the absence of a statute otherwise providing, a setoff or counterclaim may or may not be pleaded, etc."

The authorities cited are, as we understand them, as follows:

(a) *Virginia Car Chemical Co. vs. Kirwin,* 215 U. S. 249 (54 L. 179).

This was an action and not a suit. The Federal Supreme Court did not announce any rule governing that class of cases; it simply followed the rule

adopted in the state (South Carolina) from which the case arose.

(b) *Merchants Heat & Light Co. vs. Clow & Sons,* 204 U. S. 286 (51 L. 488).

This was an action and not a suit. However, in that case we note this language:

> "As we have said, there is no question at the present day, that by an answer in recoupment the defendant makes himself an actor and to the extent of his claim a cross-plaintiff in the suit.
>
> "See *Kelly vs. Garrett,* 6 Ill. 649, 652; *Ellis vs. Cothran,* 117 Ill. 458, 461, 3 N. E. 411; *Cox vs. Jordan,* 86 Ill. 560, 565."

We understand that case was decided by applying a local statute which had reference *solely* to legal actions.

The other authorities cited in the Opinion (pp. 5–6) are all *actions* and not suits.

Thus:

Moorehouse vs. Baker, 48 Mich. 335—Assumpsit.

Quick vs. Lemon, 105 Ill. 578—Action.

Davenport vs. Hubbard, 46 Vt. 200—Assumpsit.

Roach vs. Privett, 90 Ala. 391—Action.

But these authorities do not construe any statute like the Act of Congress involved. Furthermore, the present case is a *suit* and *not an action,* and the jurisdiction of equity is sought and depends upon the absence of a remedy at law. The bill (Tr., p. 8) says, par. 11, "That plaintiff has no plain, speedy or adequate remedy at law, but only in equity."

Under the Act of Congress here relied upon, and its construction as set forth at pp. 41–44 of our main brief, we urge that,—

First: The reform procedure has been adopted in actions at law;

Second: Equity cannot entertain jurisdiction of a suit based upon facts *which might have been* pleaded in the law action;

Third: The primary object of the reform procedure is to compel the litigation of all questions in one forum;

Fourth: The Ford Company was plaintiff below, and hence is the actor in this suit, and is not in the position of a mere defendant in an action; and being such plaintiff, that company should have sought relief in its own action, either

(a) By re-casting its pleadings and setting up its equities and transferring its action to the equity side of the Court; or

(b) By pleading its alleged equities in reply and asking for the case to be referred to the equity side.

But it cannot litigate the legal action, and after judgment against it there be permitted further to maintain an independent suit in equity on matters which it *may* have set up in the action.

We cite:

Ark.—Nichols vs. Shearon, 49 Ark. 75, 4 S. W. 167. (Ejectment.) Discussed, p. 80.

When the evidence of title produced by the defendant in an action of ejectment misdescribes the land, he cannot as a mode of defense to that action proceed by a suit in equity against the plaintiff to have

the deed reformed; but should make such equitable matter a ground of defense to the ejectment and move a transfer of any issue thus raised to the equity docket. And after judgment against the defendant in the ejectment suit his bill in chancery should be dismissed as the judgment against him could *not* be annulled or modified by decree in equity.

(80) "The bill was confessedly a mere mode of defense to the action of ejectment—its object being to control the proceeding in that case. But parties cannot litigate about the same subject matter both at law and in chancery at one and the same time. A defendant must make all of his defenses of whatsoever nature they may be, in the action in which he is sued; *and* if some of the issues raised are exclusively or more properly cognizable in another forum, he must *move a transfer* to the proper docket. This was the plain course for the heirs of William L. Nichols to pursue. And as the judgment against them in the ejectment could not be annulled or modified by any decree in the equity suit *except for a defense which had arisen or been discussed since its rendition,* nothing remained but to dismiss the bill."

In this case Ford Company made the payment within a few days after its replevin cause was filed and long before that case was tried, and all rights which it asserts because of such payment, were well known to it before the trial in that case.

Ga.—Field vs. Price, 52 Ga. 469 (470).

"The complainant on the trial of that case, *had the right and the opportunity* to have availed himself of any legal or equitable claim which he then had as fully

and completely as if the case had been pending in a court of equity, and if he failed or neglected to do so at the proper time, no one is to blame but himself. He has had his day in court, and must now abide its judgment, the more especially as he alleges no legal or equitable ground for the interference of the Court in his behalf.

"There was no error in the judgment of the Court below on the allegations contained in the complainant's bill."

Ida.—Utah & N. Ry. Co. vs. Crawford, 1 Ida. 770.

(Syllabus:)

(1) Under the Code of Procedure, a defendant is not only permitted, but is required, to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character.

(2) A defendant may not under the Code bring his separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action.

(3) A defense, in the sense of the Code, is a right possessed by the defendant, which either partially or wholly, defeats the plaintiff's claim.

Ky.—Hackett vs. Schad, 3 Bush, 353 (66 Ky.).

The Code requires ALL defenses, equitable as well as legal, to be pleaded to an action at law; and an equitable right, thus available, may be lost unless thus litigated. Consequently, whenever the Court saw that there was a partial, and only partial, failure of consideration, it ought to have considered the

equitable defenses by transferring the case to the equity side of the docket, and by a commissioner or otherwise, have ascertained the extent of the failure and given credit for it in the judgment.

Thomassen vs. Townsend, 10 Bush, 114 (73 Ky.).

Suit resisting amount of attorney's fees allowed in an action on a note, wherein judgment by default was entered, upon the claim that such fees are a penalty and hence usurious.

Dismissed. Court says:

> "(116) Under the common-law practice contracts involving penalties were constantly enforced, but the judgments were relieved against by courts of equity. Under our Civil Code, the equitable defense must be made to the action at law, otherwise it will be waived.
>
> "It therefore results, that when a judgment is rendered by default in a case like this, upon a petition setting out the contract in accordance with the rules of pleading, the defendant will be without remedy."

Me.—Aetna Life Ins. Co. vs. Tremblay, 101 Me. 585, 65 A. 22. (In equity.)

(Syllabus:)

> (1) A judgment for the plaintiff in an action at law concludes the defendant not only as to defenses actually made, but also as to defenses which could have been made and were not.
>
> (2) The Court cannot afterwards afford relief in equity against a judgment at law because of matter which was a defense to the action and *could have been* interposed therein.

(3) *By R. S., c. 84, sec. 17.* Equitable as well as legal defenses *may be* pleaded in an action at law. Hence if equitable defenses are not so pleaded they cannot afterwards be invoked as cause for relief in equity against the judgment.

(4) A life insurance company by paying the full amount of the policy of life insurance to one holding an assignment of the policy as security only is thereby subrogated to all the rights of such assignee upon the insurance money as against any claim therefor by a subsequent assignee of the policy; and is entitled to have the amount due the first assignee under his assignment, deducted from the claim of the second assignee. Such right by subrogation exists without any formal assignment of his claims by the first assignee to the insurance company.

(5) Such right by subrogation is at least equitable matters of defense to an action at law upon the policy, by the second assignee, and under the statute (if not at common law) it *can* and hence *should* be interposed in such action. It is not ground for subsequent relief in equity against the judgment."

(P. 589.)

"It is suggested that the desired relief was not the company's right in the action at law, but was rather a matter of grace; that to have obtained the relief would have required a transformation of the action at law into a suit in

equity as provided by statute, and that the Court had the power to refuse to order such transformation. No such transformation was necessary. There was no difficulty in affording the desired relief in the action at law. The question of the validity and amount of the Cloutier claim could have been determined in that action, with or without the assistance of an auditor or jury as fully and accurately as in an equity suit. It was the right of the company to have that question determined in that action. * * *

"It follows, that a defendant cannot now withhold an available defense, even though equitable in its nature, in the trial of an action at law, and after judgment against him bring forward that defense in a new suit, and require the Court to give it effect by amending or reforming its former judgment. We think one purpose of the statute was not only to remove the necessity of, but to prevent such procedure.

"If, as is suggested, the Cloutier claim was before the Court in the action at law but was not considered or if considered was erroneously disallowed or if for any reason justice was not done in the action at law through accident, mistake or misfortune, and a further hearing would be just and equitable the company's remedy is by a petition for a review of that action, not by a new original suit alleging matters that were or could have been interposed in defense of the first suit."

Minn.—Fowler vs. Atkinson, 6 Minn. 305.

Under the Act of March 5, 1853 (Comp. Stats. 480), a defendant must interpose any equities he has by way of defense, and he cannot afterwards sue upon them.

Mo.—Kelly vs. Hurt, 74 Mo. 561.

If the defendant in an action at law having an equitable defense fails to present it, he cannot afterwards make it the ground of an independent action against the former plaintiff. (Per Sherwood, C. J.)

N. Y.—Savage vs. Allen, 54 N. Y. 458.

"An action cannot be maintained to restrain by injunction the proceedings in the same or another court between the same parties, where the relief sought *may* be obtained by a proper defense in such suit.

Winfield vs. Bacon, 24 Barb. 154.

(Syllabus, point 3:)

> "As a general rule, a defendant who has an equitable defense to an action, being now *authorized* to set it up by answer, *is bound to do so,* and he will not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action in the same court.

Foot vs. Sprague, 12 How. Pr. 355.

"Such a state of facts might not have been available as a defense to an action of ejectment at common law.

"But, I apprehend a court of equity, upon a bill containing this statement, would not have hesitated to restrain the prosecution of such an action, until the plaintiff should at least refund the purchase money he had received, and perhaps, make compen-

sation for the improvements made upon the lands by the defendant. If so it is now a good ground of defense. It is no longer necessary to bring a suit in equity to restrain inequitable proceedings at law. A defense, purely equitable in its character, may be interposed to a cause of action strictly legal. Indeed, the defendant MUST avail himself of such a defense in this way if he would do so at all; for it is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action pending in the same court.

Va.—Hage vs. Fidelity & T. Co., 102 Va. 1, 48 S. E. 494.

"The defense of equitable estoppel is, as a rule, as available in courts of law as in courts of equity, and the relief is as full and adequate in the one as in the other, and where the two courts have concurrent jurisdiction of the subject matters the defense *must* be made in that one which first acquires jurisdiction except in those cases where the jurisdiction of the law court is conferred by a statute which provides otherwise.

"A court of equity will not enjoin a judgment at law unless the party seeking such relief has failed in obtaining redress at law by reason of the fraud of the opposite party or inevitable accident or mistake and there has been no default on the part of himself or his counsel.

"The mere fact that a party has mistaken his rights and so has failed to make his defense at law, does not entitle him to relief in equity."

22 Cyc. 799 says, *inter alia:* "So where purely equitable defenses are clearly available at law, no injunction will be granted restraining an action at law because of the existence of such a defense, and equitable defenses *may* under the codes, be set up in an action at law, even though to make them effectual affirmative relief is necessary, and therefore they cannot be made the basis of an independent suit for such equitable relief."

23 Cyc. 1008, says: "If a party's defense to an action at law was not within the cognizance of the court of law, * * * he is, of course, not chargeable with negligence, etc., * * * but under the codes of practice which blend legal and equitable powers or confer extensive equitable powers upon the courts of common law, it is held that a defense, if available under the code, must be set up in the original action, and cannot be made the basis of a subsequent application to equity, although it is inherently equitable in its nature."

23 Cyc., p. 1200, says: " * * * but a judgment at law will not conclude defenses which were of a purely equitable character, and therefore not cognizable in an action at law, except in those states where the blending of law and equity *permits* all defenses of whatever character, to be set up in an action at law."

The Act of Congress under consideration was designed for some purpose: it was intended to make a change in proceedings in actions at law, and we believe that the change which it did make and was intended to make, was and is to blend legal and equi-

table matters so that in an action they may be set up. Of course, in a suit they always were blended and the result of the Act is to ingraft upon actions the reform procedure.

Furthermore, the Opinion on file says:

> "The case comes within the general rule that in the absence of a statute otherwise providing, a setoff or counterclaim may or may not be pleaded, etc."

But we have shown that all the authorities cited by the Court as sustaining the rule, are *actions* and not suits.

We rely upon the fundamental statement that equity has no jurisdiction where a law court *can or may* give relief.

We respectfully urge that this case calls for an interpretation of the Act of Congress and its application to the facts at bar.

Upon the above suggestions and those of like import urged in the main brief, we submit errors 1st, 2d, 3d, 6th and 7th, above specified.

SUBROGATION.

The Court says: (Opinion, p. 4.)

> "The appellee's payment to the bank was not expressly or impliedly involved in, but was entirely independent of the subject matter of the replevin action and the issues therein, and the appellee's demand therefore is not merged in the judgment."

The bill (Tr., pp. 2–9) is framed upon the theory of a contract (Exhibit "A") which related to and

governed the questions of both title and right to possession, and gave the lien for 85%—(entire sums advanced as purchase money)—which enabled the appellants to mortgage the property. The payment is said to have been made because the mortgage created a lien upon the property described in the complaint in the replevin action and the possession of which property was adjudged to be in Winchell & Hathaway. If the payment did not relate to the possession of this property and was entirely independent "of the question of title or right of possession" thereof, it is difficult to find a basis for Ford Co. to rest its claim of subrogation. Its entire theory of the case rests upon the claim that the payment was necessary because Winchell & Hathaway mortgaged its property which was involved in the replevin case, treated either as a possessory action simply or one involving both title and possession.

An examination of the authorities cited in the Opinion (pp. 3–4) discloses that subrogation was permitted there, because of the relation which the payments involved in each case bore to the property involved. Subrogation was decreed as an equitable remedy, and the rights arising were correspondingly enforced; but here, the payment was made to relieve the property involved in the replevin case of a lien and was made necessary (as it is claimed) by the contract which required the re-payment of the 85% paid on sight draft before the cars were unloaded, before the right to re-take the property could attach (see contract clauses 10, 13, 49); no other asserted right is or can be found in the bill, except as recited

above. It seems, therefore, that the entire case rested upon the theory that the payment was necessary to relieve the title of the property involved in the replevin case, from a lien which Ford Co. says was upon its property, so that the right to possession would again be in Ford Co.

But, we urge, that this situation does not and did not prevent the Ford Company from setting up its rights in the action at law, and that the permissive or elective right to do so operates to prevent an independent suit from being maintained, because a remedy in the law courts was available at all times after the payment, either (a) by amending the complaint and setting forth all rights, or (b) by pleading such rights in the reply and moving for transfer of the case to the equity calendar.

Aetna Life Ins. Co. vs. Tremblay, 101 Me. 585, 65 Atl. 22.

In addition, we add, that the contract at the following clauses is consistent only with a sale absolute, and not a bailment:

Clause 34, p. 27: (Provides for return of parts; no such clause relates to the return of the cars themselves, at agents' option.)

Clause 22, pp. 18–19: (Provides for sales ONLY of the cars; no right of return is given the agent.)

Clauses 15 and 7 construed together, mean that when Ford Co. is paid its 85%, the agents may sell on whatsoever terms may suit them.

This contract, therefore, provides in effect that the agents shall not have the right to return the property "consigned" while the right and duty to return the

specific property is the first and primary test in deciding whether a consignment is a bailment or sale.

Bailments. 6 C. J. 1086.

The statement in the Opinion that,—

> "The appellee's payment to the bank was not expressly or impliedly involved in, but was entirely independent of the question of title or right of possession of the subject matter of the replevin action and the issues therein * * * " it seems to us, hardly accords with the complaint or the theory of the case.

The subject matter of the replevin case was the right to the possession of these particular automobiles; the right of subrogation is claimed by a payment of a mortgage on these same automobiles; the contract says that Ford Co. must repay this 85% before taking possession of the machines and that Winchell & Hathaway have a specific lien on the property for that amount.

By reasons of these relations, the Ford Co. claims to have made the payment and on such theory the decree was based. Of course, we still insist the title passed to Winchell & Hathaway when they paid the 85% of this price, but on either set of facts the mortgaged property, as well as the mortgage, was directly involved in the question of both title and right of possession.

Winchell & Hathaway had no right to the possession in the first instance until they had paid the 85% and Ford Co. had no right to retake the possession until it had repaid it. Instead of making this payment to Winchell & Hathaway, it sought to pay

$12,000.00 of said sum to the bank and tendered the balance into Court, as set forth in paragraph VII of the amended complaint.

Disclaiming disrespect, we submit that the statement above made is incorrect.

We, therefore, feel justified in urging that the Opinion is the result of a misconception of the facts and of the relation asserted thereby.

In conclusion, we believe that this case calls for the construction of the Act of Congress as above urged; but if your Honors adhere to the view that such Act merely enables or permits the pleading of certain defenses, then we insist that the fact that the law provides a permissive and elective remedy is sufficient to defeat the jurisdiction of equity and a re-hearing should be granted herein.

Respectfully submitted,

ISHAM N. SMITH,

421 Mohawk Building, Portland, Oregon,

Attorney for Petitioners.

I, Isham N. Smith, the petitioning attorney herein, do hereby certify that I am the attorney who prepared the above and foregoing petition for rehearing; that I have carefully considered the same and that such petition, in my judgment, is well founded in law and in fact, and is not interposed for the purpose of delay.

Dated June 2, 1920.

ISHAM N. SMITH,

Attorney for Petitioners.

No. 3437

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintff in Error,

vs.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index.

Names and Addresses of Attorneys of Record.

CLEON T. KNAPP, Bisbee, Arizona,
BOYLE & PICKETT, Douglas, Arizona,
Counsel for Plaintiff in Error.

KIBBEY, BENNETT & JENCKES, Phoenix, Arizona,
Counsel for Defendant in Error. [1*]

In the Superior Court of the County of Pima, State of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff and complaining of the defendant, the New Cornelia Copper Company, says:

I.

That the defendant is and was at all the times mentioned hereinafter a corporation duly organized under the laws of the State of Delaware, and was at all of said times and still is engaged in the business of mining, in Pima County, in the State of Arizona.

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*Page-number appearing at foot of page of original certified Transcript of Record.

II.

That on or about the 27th day of November, 1918, Jose Maria Ochoa, late of the Republic of Mexico, died within the State of Arizona, intestate.

That thereafter, to wit, on the 20th day of January, 1919, the plaintiff, Ignacio S. Espinoza, was by the order and judgment of the Superior Court of Maricopa County in said State of Arizona, duly made, rendered and entered therein, appointed administrator of the estate of the said Jose Maria Ochoa, deceased, and did thereafter and before the commencement of this suit duly qualify as such administrator and thereupon entered upon and has ever since and now is the duly appointed, qualified and acting administrator of said estate.

III.

That on the 27th day of November, 1918, the day as aforesaid of the death of plaintiff's intestate, the defendant was, had been for a long time theretofore, ever since has been, and now is, engaged in the business and occupation of mining and operating its mines at and near Ajo in the County of Pima [2] in said State of Arizona, and in the extraction of ores therefrom by means, among other methods, of tunnels, open pits, shafts and other excavations into the earth. That in the prosecution of said work the defendant then had and used in and about said mines large quantities of gunpowder, blasting powder, dynamite, compressed air, and other explosives.

That on said 27th day of November, 1918, the plaintiff's intestate, the said Jose Maria Ochoa, was employed by the defendant to work in and about the

working and operation of said mines then being operated by the defendant as aforesaid, and was actually engaged in work and labor under said employment, in and about said mines, and in dangerous proximity to said gunpowder, blasting powder, dynamite and other explosives which were then upon and about said mines and had been placed there by the defendant for use in the carrying on of its said work of mining. That said Ochoa, the intestate, had no notice or knowledge of the dangerous proximity to him of said gunpowder, blasting powder, dynamite and other explosives. That while said Ochoa, deceased, was so upon said mines and while there actually engaged in the work and labor for which he had as aforesaid been employed by the defendant and while in said dangerous proximity to said gunpowder, blasting powder and other explosives, said gunpowder, blasting powder, dynamite and other explosives were, without any fault of the plaintiff's intestate exploded. That by the effect of said explosion plaintiff's intestate then and there being as aforesaid was killed. That the said death of plaintiff's intestate was not caused by the negligence of him the said intestate.

IV.

By reason of the premises and by virtue of the laws of the State of Arizona in such case made and provided, namely, by virtue of the provisions of Chapter 6, Title 14, Revised Statutes of the State of Arizona, 1913, relating to the "Liability of Employers for Injuries to Workmen in Dangerous Occupations," defendant is liable in damages to the plain-

tiff, as administrator of the estate of said Jose Maria Ochoa, deceased, [3] and for the benefit of his said surviving widow and children, and plaintiff alleges that by reason of the premises the estate of said Jose Maria Ochoa, deceased, has sustained damages in the sum of Twenty Thousand Dollars ($20,000.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Twenty Thousand Dollars ($20,000.00) and for his costs of suit herein incurred.

And for a second cause of action against the defendant, plaintiff alleges:

I.

That the defendant is and was at all the times mentioned hereinafter a corporation duly organized under the laws of the State of Delaware, and was at all of said times and still is engaged in the business of mining, in Pima County, in the State of Arizona.

II.

That on or about the 27th day of November, 1918, Jose Maria Ochoa, late of the Republic of Mexico, died within the State of Arizona, intestate.

That thereafter, to wit, on the 20th day of January, 1919, the plaintiff, Ignacio S. Espinoza, was by the order and judgment of the Superior Court of Maricopa County in said State of Arizona, duly made, rendered and entered therein, appointed administrator of the estate of the said Jose Maria Ochoa, deceased, and did thereafter and before the commencement of this suit duly qualify as such administrator and thereupon entered upon and has ever

since and now is the duly appointed, qualified and acting administrator of said estate.

III.

That on said 27th day of November, 1918, the day as aforesaid of the death of plaintiff's intestate, the defendant was, had been for a long time theretofore, ever since has been, and now is, engaged in the business and occupation of mining and operating its mines at and near Ajo in the County of Pima [4] in said State of Arizona, and in the extraction of ores therefrom by means, among other methods, of tunnels, shafts and other excavations into the earth, and by the use of gunpowder, blasting powder, dynamite, and other explosives.

IV.

That on said 27th day of November, 1918, the plaintiff's intestate, the said Jose Maria Ochoa, was employed by the defendant to work in and about the working and operation of said mines then being operated by the defendant as aforesaid and was actually engaged in work and labor under said employment in and about said mines. That on said day the defendant negligently and carelessly had and kept in and upon its said premises in and about said mines for use in the working and operations thereof as aforesaid large quantities of gunpowder, blasting powder, dynamite and other explosives. That by reason of the carelessness and negligence of defendant in so having and keeping such gunpowder, blasting powder, dynamite and other explosives in and upon said premises in and about said mines, and while plaintiff's intestate, said Ochoa, was so engaged

in such work and labor as aforesaid, and was then and there exercising due care for his own safety, a certain dangerous quantity of said gunpowder, blasting powder, dynamite and other explosives so had and kept upon said premises as aforesaid, was by the defendant carelessly and negligently permitted to, and did then and there, explode. That by the effect of said explosion plaintiff's intestate, the said Jose Maria Ochoa, then and there being as aforesaid, was killed. That the death of plaintiff's intestate was caused by the wrongful act, negligence and default of the defendant as hereinbefore set forth.

V.

That by reason of the premises, plaintiff, as administrator of the estate of the said Jose Maria Ochoa, deceased, has sustained damages to said estate in the sum of Twenty Thousand Dollars ($20,000.00).

WHEREFORE, plaintiff as administrator of the estate of Jose Maria Ochoa, deceased, prays judgment against the defendant in the sum of Twenty Thousand Dollars ($20,000.00), and for his [5] costs of suit herein incurred.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 6701. In the Superior Court of the County of Pima, State of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Complaint. Filed Feb. 17, 1919. Olive G.

Failor, Clerk. Kibbey, Bennett & Jenckes, Fleming Block, Phoenix, Arizona, Attorneys for Plaintiff.

In the Superior Court of Pima County, State of Arizona.

No. 6701.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Action Brought in the Superior Court of Pima County, State of Arizona, and the Complaint Filed in said County of Pima, in the Office of the Clerk of said Superior Court.

Summons.

In the Name of the State of Arizona, to New Cornelia Copper Company, a Corporation, Defendants, GREETING:

YOU ARE HEREBY SUMMONED and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of Pima County, State of Arizona, in and for Pima County, and answer the Complaint therein filed with the Clerk of this Court, at Tucson, in said County, within twenty days after the service upon you of this summons, if served in this county, or in all other cases

within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the Superior Court of Pima County, State of Arizona, this 16th day of February, 1919.

[Seal] OLIVE G. FAILOR,
Clerk of said Superior Court.
By Maude I. Bowen,
Deputy. [6]

Sheriff's Office,
County of Pima,—ss.

I hereby certify that I received the within Summons on the 17th day of February, A. D. 1919, and personally served the same at the hour of 10:30 A. M. on the day of February 17, A. D. 1919, on the within named New Cornelia Copper Company, being the said defendant named in said Summons by delivering to Frank H. Hereford, Statutory Agent of the New Cornelia Copper Company, in the County of Pima, a copy of said Summons, to which was attached a true copy of the Complaint mentioned in said Summons.

Dated this 17 day of Feb., A. D. 1919.

J. T. MILES,
Sheriff.
L. T. JOHNSON,
Deputy Sheriff.

Fees, Service $1.00
Travel, 1 mile ..... .20

Total.....$1.20

[Endorsements]: No. 6701. In the Superior Court, County of Pima, State of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Summons. Filed February 17th, 1919. Olive G. Failor, Clerk. By F. J. Brucker, Deputy.

In the Superior Court of the State of Arizona, in and for the County of Pima.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Petition for Removal.

To the Honorable, The Superior Court of the State of Arizona, in and for the County of Pima.

Your petitioner, the New Cornelia Copper Company, a corporation, defendant in the above-entitled suit, appearing only for the purpose of this petition, respectfully shows to your Honorable Court:

I.

That the above-entitled suit is of a civil nature, of [7] which the District Court of the United States are given original jurisdiction by the laws of the United States; that the matter and amount in dispute in the above-entitled suit exceeds the sum or

value of Three Thousand ($3,000.00) Dollars, exclusive of the interest and costs; that the controversy in said suit is and at the time of the commencement of this suit was between citizens of different states, to with, between plaintiff, Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, who is and was at the time of the commencement of said suit, a citizen and resident of the State of Arizona, and your petitioner, the defendant in the above-entitled suit, which is and was at the time of the commencement of said suit, a corporation, organized, created, and existing under and by virtue of the laws of the State of Delaware, and was at the time of the commencement of said suit, and still is, a resident and citizen of the State of Delaware, and was then and is now a nonresident of the State of Arizona, and that your petitioner and said plaintiff are the actual and original parties interested in said controversy.

II.

And your petitioner offers and files herewith bond with good and sufficient surety for its entering in the District Court of the United States for the District of Arizona (Tucson District), within thirty (30) days from the date of filing this petition, a certified copy of the record in said suit, and for paying all costs that may be awarded by said District Court, if the said District Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to

accept said bond and sureties, and to cause the record in said suit to be removed into the said District Court of the United States for the District of Arizona; and it will ever pray.

CLEON T. KNAPP,
Attorney for New Cornelia Copper Company, Petitioner.

State of Arizona,
County of Pima,—ss. [8]

Cleon T. Knapp, being duly sworn, deposes and says: That he is attorney for New Cornelia Copper Company, a corporation, the petitioner in the above and foregoing petition, and makes this affidavit for and on behalf of said petitioner, being duly authorized thereunto; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge.

CLEON T. KNAPP.

Subscribed and sworn to before me this 4th day of March, A. D. 1919.

[Seal] CHARLES R. WOODS,
Notary Public, Cochise County, Arizona.

My commission expires May 23d, 1921.

[Endorsements]: No. 6701. In the Superior Court of Pima County, State of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Petition for Removal. Filed March 8, 1919. Olive G. Failor, Clerk. By F. J. Brucker, Deputy. Cleon T. Knapp, Bisbee, Arizona, Attorney for Defendant.

In the Superior Court of the State of Arizona, in and for the County of Pima.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY,
Defendant.

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS: That we, the New Cornelia Copper Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and lawfully engaged in its corporate business in the County of Pima, State of Arizona, as principal, and L. C. Shattuck and W. B. Gohring both of Cochise County, State of Arizona, as sureties, are held and firmly bound unto Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, plaintiff in the above-entitled action, his heirs, administrators, executors and assigns, in the penal sum of Five Hundred ($500.00) Dollars, for the payment whereof, well and truly to be made, unto the said Ignacio S. Espinoza, as administrator [9] of said estate, his heirs, administrators, executors and assigns, we bind ourselves, our heirs, successors, executors, administrators and assigns, jointly and severally, firmly by these presents:

The condition of the obligations are such, that

WHEREAS, the said New Cornelia Copper Com-

pany, a corporation, has petitioned the Superior Court of the State of Arizona, in and for the County of Pima, for the removal of a certain cause therein pending, wherein the said Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, Deceased, is plaintiff, and the said New Cornelia Copper Company is defendant, to the District Court of the United States for the District of Arizona.

NOW, THEREFORE, if the said New Cornelia Copper Company, a corporation, shall enter in the said District Court of the United States, within thirty days from the date of filing of said petition for a removal, a certified copy of the record in said suit, and shall pay all costs that may be awarded by said district, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 4th day of March, A. D. 1919.

NEW CORNELIA COPPER COMPANY.
By ARTHUR W. ENGELDER,
L. C. SHATTUCK,
W. B. GOHRING.

State of Arizona,
County of Pima,—ss.

L. C. Shattuck and W. B. Gohring, being first duly sworn, each for himself and not one for the other, deposes and says: I am the same person whose name is subscribed to the above and foregoing bond; that I am a resident and property holder within the State

of Arizona; that I am worth the sum of Five Hundred ($500.00) Dollars over and above my just debts and liabilities, exclusive of property exempt from execution.

L. C. SHATTUCK.
W. B. GOHRING.

Subscribed and sworn to before me this 4th day of March, A. D. 1919.

[Seal] CHARLES R. WOODS. [10]

My commission expires May 23d, 1921.

[Endorsements]: No. 6701. In the Superior Court of the County of Pima, State of Arizona. Ignacio S. Espinoza, as Adm. of the Estate of Jose Maria Ochoa, Dec'd, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Bond for Removal. Filed March 8, 1919. Olive G. Failor, Clerk. Cleon T. Knapp, Bisbee, Arizona, Attorneys for Defendant.

Approved March 10, 1919.

SAMUEL L. PATTEE,
Judge.

In the Superior Court of the State of Arizona, in and for the County of Pima.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Notice of Petition and Bond for Removal.

To Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff in the Above-entitled Action, and Kibbey, Bennett & Jenckes, Attorneys for Plaintiff:

PLEASE TAKE NOTICE that on Saturday, the 8th day of March, A. D. 1919, at 10 o'clock A. M. of said day, the defendant in the above-entitled suit will file in the office of the Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, the Petition, of which a copy is hereunto annexed, for the removal of said suit to the District Court of the United States for the District of Arizona (Tucson District), and that said defendant will also, then and there, file the Bond, of which a copy is hereto annexed, and that on Monday the 10th day of March, at 2 o'clock P. M. of said day or as soon thereafter as counsel can be heard, said defendant will request said Superior Court to accept said petition and bond, and to cause a certified copy of the record in said suit to be removed into the District Court of the United States.

Dated at Bisbee, Cochise County, Arizona, this 4th day of March, A. D. 1919. [11]

CLEON T. KNAPP,
Attorney for Defendant.

[Endorsements]: No. 6701. In the Superior Court of the County of Pima, State of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. No-

tice of Petition and Bond for Removal. Filed March 8, 1919. Olive G. Failor, Clerk. By F. J. Brucker, Deputy. Cleon T. Knapp, Bisbee, Arizona, Attorney for Defendant.

In the Superior Court of the State of Arizona, in and for the County of Pima.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Affidavit of Mailing.

State of Arizona,
County of Cochise,—ss.

M. Irving, being first duly sworn, according to law, deposes and says: That on the 4th day of March, A. D. 1919, she deposited in the postoffice at Bisbee, Cochise County, Arizona, registered and postage prepaid, an envelope addressed to Kibbey, Bennett & Jenckes, Phoenix, Arizona; which said envelope contained a copy of the following papers, in the above-entitled action: (1) Petition for Removal; (2) Notice of Petition for Removal; (3) Bond for Removal; all in connection with the removal of the above-entitled action from the Superior Court of the State of Arizona, in and for the County of Pima, to the United States District Court of Arizona (Tucson Dis-

trict), the originals of which were filed in the Superior Court of Pima County, on March 8th, 1919.

M. IRVING.

Subscribed and sworn to before me this 5th day of March, A. D. 1919.

[Seal] CHARLES R. WOOD,
Notary Public, Cochise County, Arizona.
My commission expires May 23d, 1921. [12]

[Endorsements]: No. 6701. In the Superior Court of the County of Pima, State of Arizona. Ignacio S. Espinoza, as Adm. of the Estate of Jose Maria Ochoa, Dec'd, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Affidavit of Mailing. Filed March 8, 1919. Olive G. Failor, Clerk. By F. J. Brucker, Deputy. Cleon T. Knapp, Bisbee, Arizona, Attorney for Defendant.

In the Superior Court of the State of Arizona, in and for the County of Pima.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Order of Removal.

Comes now the defendant in the above-entitled suit by Cleon T. Knapp, its attorney, and presents its

petition and bond for the removal of said suit to the District Court of the United States for the District of Arizona, said petition and bond having been filed in this court on the 8th day of March, A. D. 1919, which bond and the sureties thereon were and hereby are duly approved by this Court.

And it appearing to the Court that notice of defendant's intention to present said petition and bond at this time to this Court was duly mailed on the 4th day of March, A. D. 1919, to Kibbey, Bennett & Jenckes, plaintiff's attorney of record, and that a proper cause for removal is shown by defendant's said petition for removal.

IT IS THEREFORE, on motion of said defendant, ORDERED by the Court that said suit be, and the same is hereby removed to the District Court of the United States for the District of Arizona, and that the clerk of this court forthwith prepare a certified copy of the record in said suit to be filed in said District Court of the United States, as required by law.

Done in open court this 10th day of March, A. D. 1919.

SAMUEL L. PATTE,
Judge. [13]

[Endorsements]: No. 6701. In the Superior Court of Pima County, State of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Dec'd, vs. New Cornelia Copper Company, a Corporation, Defendant. Order of Removal. Filed

March 10, 1919. Olive G. Failor, Clerk. Cleon T. Knapp, Attorney for Defendant.

In the Superior Court of the State of Arizona, in and for the County of Pima.

No. 6701.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Clerk's Certificate to Record on Removal.

State of Arizona,
County of Pima,—ss.

I, Olive G. Failor, Clerk of the Superior Court of the State of Arizona, County of Pima, hereby certify that the above and foregoing is a full, true and correct copy of the record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being suit No. 6701, wherein Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, Deceased, is plaintiff, and New Cornelia Copper Company, a corporation, is defendant, said record consisting of

Complaint filed in said suit by plaintiff on the 17th day of February, 1919;

Summons and return thereon, filed in said suit on the 17th day of February, 1919;

Petition for removal of said suit to the United States District Court for the District of Arizona, filed by said defendant in said suit on the 8th day of March, 1919;

Bond for removal, filed March 8, 1919;

Notice of petition and bond for removal, filed March 8, 1919;

Affidavit of mailing copies of all papers in connection with the removal of the above-entitled action to counsel for plaintiff, filed March 8, 1919;

Order for removal of said suit to said United States District Court for the District of Arizona, entered of record in said suit on the 10th day of March, 1919,

all as appears on the files and of record in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the said Superior Court this 12th day of March, 1919.

[Seal] OLIVE G. FAILOR,
Clerk. [14]

[Endorsements]: No. 215—Tucson. No. 6701. In the Superior Court of the State of Arizona, in and for the County of Pima. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Clerk's Certificate of Record. Filed March 28, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [15]

In the United States District Court, in and for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Notice of Motion Requiring Plaintiff to Elect.

Kibbey, Bennett & Jenckes, Attorneys for Plaintiff.

Sirs: Please take notice that the defendant above named, upon the annexed motion, will move the above-named court, at the courtrooms, at Tucson, Arizona, on Monday the 5th day of May, A. D. 1919, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to require the plaintiff herein to elect as between the two causes of action alleged by him in the complaint herein, and to require plaintiff, upon such election being made, to dismiss the other cause of action, or for such order of the Court as may be proper to accomplish the same purpose.

CLEON T. KNAPP,
Attorney for Defendant.

Dated April 3d, 1919.

In the United States District Court, in and for the District of Arizona.

Case No. 215—TUCSON.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Motion Requiring Plaintiff to Elect.

Comes now the defendant in the above-entitled action, and moves the Court to require the plaintiff to elect as between the two [16] causes of action alleged by said plaintiff in the complaint herein.

And upon plaintiff making such election, requiring plaintiff to dismiss the other cause of action, or for such order of the Court as will accomplish the same purpose.

Further defendant states that the complaint of the plaintiff herein alleges two causes of action, the first being under Chapter Six, Title XIV of the Revised Statutes of Arizona, 1913, commonly known as the Employers' Liability Law; the second cause of action under the common-law liability, alleging certain negligent acts and omissions upon the part of the defendant.

CLEON T. KNAPP,
Attorney for Defendant.

Dated April 3d, 1919.

[Endorsements]: No. 215. In the United States District Court in and for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Motion Requiring Plaintiff to Elect. Filed April 5, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. Cleon T. Knapp, Attorney at Law, Bisbee, Arizona, Attorney for Defendant.

In the United States District Court, in and for the District of Arizona.

Case No. 215—TUCSON.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Answer.

The above-named defendant, for its answer to the complaint herein, alleges:

DEMURRER.

I.

Defendant demurs to the complaint herein on the ground that the plaintiff has improperly joined and united two distinct and separate causes of action in

the said complaint, under two counts: [17] The first cause of action under Chapter Six, Title XIV, of the Revised Statutes of Arizona, 1913, commonly known as the Employers' Liability Law; the second cause of action under the common-law liability, alleging certain negligent acts and omissions upon the part of the defendant.

II.

Defendant demurs to the said complaint herein, on the ground that the complaint shows that plaintiff seeks to recover judgment against defendant under and by virtue of Chapter Six, Title XIV of the Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and Section 7 of Article XVIII of the Constitution of the State of Arizona, and that said Employers' Liability Law and said section of the Constitution of Arizona, are both unconstitutional and void, in that said provisions are contrary to and contravene the Fourteenth Amendment to the Constitution of the Unied States, in that said provisions deprive the defendant of its property, without due process of law and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries by its employees, without any fault or negligence on the part of the defendant causing such injury, or contributing thereto, and therefore that plaintiff's complaint fails to state facts sufficient to constitute a cause of action against defendant.

WHEREFORE defendant prays judgment as to the sufficiency of said complaint, and for its costs.

CLEON T. KNAPP,
Attorney for Defendant.

PLEAS IN BAR.

Further answering the complaint herein, though not waiving any defense hereinbefore interposed, defendant alleges:

I.

Denies each and every allegation contained in paragraphs 2, 3, and 4 of the first cause of action alleged in the complaint herein and denies each and every allegation contained in paragraphs 2, 3, 4 and 5 of the second cause of action of the complaint herein, [18] except as may be herein specifically admitted or otherwise qualified.

II.

Admits that the defendant is a corporation organized and existing under the laws of the State of Delaware, and engaged in mining business in the County of Pima, Arizona.

III.

Denies that the decedent, Jose Maria Ochoa, was engaged in any work or employment for, by or in behalf of the defendant at the time of the alleged accident, as alleged in the complaint or otherwise.

IV.

Denies that the gunpowder, blasting powder, dynamite or other explosive which the plaintiff herein alleged was exploded and resulted in ,the

death of said decedent, was owned by, or under the direction or control of, said defendant at the time of the said alleged accident, resulting in the death of said decedent.

V.

Alleges that if said decedent was killed, either as alleged in the said complaint or otherwise, which is not admitted, but is expressly denied, that said decedent's death wholly resulted from and was wholly caused by decedent's wilful neglect and carelessness and his failure to use any care or caution in his own behalf at the time and place of the said alleged accident.

WHEREFORE defendant demands judgment dismissing the complaint together with its costs.

CLEON T. KNAPP,
Attorney for Defendant.

4/3/19.

[Endorsements]: No. 215. In the United States District Court in and for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Answer. Filed April 5, 1919. Mose Drachman, Clerk, by Effie D. Botts, Chief Deputy Clerk, Cleon T. Knapp, Attorney at Law, Bisbee, Arizona, Attorney for Defendant. [19]

In the United States District Court, District of Arizona.

Minute Entry of October 1st 1919.

No. 215 (TUCSON).

IGNACIO ESPINOZA,

Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—October 1, 1919—Order Sustaining Motion Requiring Plaintiff to Elect.

This matter coming on for hearing upon defendant's motion to require plaintiff to elect, said motion was argued by counsel, Jos. S. Jenckes for plaintiff and Cleon T. Knapp for the defendant, and submitted to the Court, and thereupon said motion is sustained and the plaintiff by counsel in open court thereupon elects to proceed under the Employers' Liability Law, and the case is ordered set for trial for October 22d, 1919.

In the United States District Court, District of Arizona.

Minute Entry of October 22d, 1919, No. 215 (Tucson).

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER CO., a Corporation,
Defendant,

Minutes of Court—October 22, 1919—Trial.

This case came on this day regularly for trial, Joseph S. Jenckes, Esquire, appearing for the plaintiff, and Cleon T. Knapp and Boyle and Pickett, appearing for the defendant, and both parties announce ready for trial. Eighteen jurors were called and all found to be qualified. Both parties exercise their right of respective challenge and the following twelve jurors were called according to law and duly sworn to well and truly try the issues joined herein, viz: W. W. Beckley, Joe Deck, John Gardiner, H. Petheran, P. A. Stollar, S. F. Freeman, E. J. Whistler, J. B. Glover, R. E. Young, C. J. Sellers, Paul Bensch and Phil Countzen, John Walker was duly sworn as court reporter in this case. Joseph S. Jenckes then read aloud plaintiff's complaint, and Cleon T. Knapp [20] then read aloud defendant's answer thereto. C. H. Tully was duly sworn as Spanish interpreter in this case. The plaintiff then

to maintain upon his part the issues herein offered in evidence a certified copy of the letters of administration, which were admitted and filed marked Plaintiff's Exhibit No. 1, and called as witnesses Mrs. Urelia Ochoa and Juan Delgado, who were duly sworn, examined and cross-examined and thereupon the plaintiff rested his case. The defendant then moved the Court for an instructed verdict in its behalf, which motion was denied by the Court, to which ruling of the Court, defendant excepts. The defendant then to maintain upon its part the issues herein called as witnesses Charles W. McHenry, and Peter R. Brady, who were duly sworn, examined and cross-examined and Juan Delgado who was examined, and thereupon the defendant rested its case. There being no further testimony offered and the evidence being closed and completed, the case was argued by counsel and the Court duly instructed the jury orally and said jury retire in charge of their bailiff, J. F. Pfeiffer, first duly sworn, to consider their verdict. And subsequently said jury return into court and upon being asked if they have agreed upon a verdict report that they have agreed and thereupon present the following verdict:

IGNACIO S. ESPANOZA, Adm.,

Plaintiff,

against

NEW CORNELIA COPPER CO.,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the

above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at ($10,000.00) ten thousand dollars.

JOHN GARDINER,
Foreman.

Wherefore, by virtue of the law and the premises, it is ordered by the Court that judgment be entered in accordance with said verdict. Thereupon defendant moves the Court to set aside the verdict as being excessive, which motion is denied by the Court, to which ruling of the Court, defendant excepts, and thereupon the defendant gives notice of motion for new trial, which motion is set for hearing for October 27th, 1919. [21]

In the United States District Court, District of Arizona.

Minute Entry of Wednesday, October 22d, 1919.

No. 215 (TUSCON).

IGNACIO S. ESPINOZA, Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Minutes of Court—October 22, 1919—Judgment.

This cause coming on regularly for trial this 22d day of October, 1919, before the Court and a jury,

the Honorable Wm. H. Sawtelle, Judge presiding, comes now the plaintiff by Kibbey, Bennett and Jenckes, his attorneys, and the defendant by Messrs. Cleon T. Knapp and Boyle and Pickett, its attorneys, also comes, whereupon a jury of twelve qualified persons was duly and regularly empaneled and sworn to try the cause. Whereupon evidence was introduced as well on behalf of defendant as of plaintiff, and the case being closed, the jury after hearing arguments of counsel and being instructed by the Court, retired in charge of their sworn bailiff to consider of their verdict, and subsequently returned into court their verdict agreed upon, which said verdict, being read and recorded by the clerk, is in words and figures following, to wit:

IGNACIO S. ESPANOZA, Adm.,

Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY,

Defendant.

Verdict.

We the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at ($10,000.00) Ten Thousand Dollars.

JOHN GARDINER,

Foreman.

Whereupon by virtue of the law and the premises, it is now by the Court

ORDERED, ADJUDGED AND DECREED, and the Court does hereby order and decree that the plaintiff, Ignacio S. Espinoza, as Administrator of the estate of Jose Maria Ochoa, deceased, do have and recover of and from the defendant, New Cornelia Copper Company, a corporation, for the benefit of the surviving widow and children of said Jose Maria Ochoa, the sum of Ten Thousand Dollars ($10,000.00) [22] together with plaintiff's costs and disbursements incurred in this action taxed and allowed at the sum of $64.40.

In the United States District Court, for the District of Arizona.

Docket No. 215—TUCSON.

IGNACIO ESPINOZA, Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Motion for New Trial.

COMES NOW the defendant in the above-entitled cause and moves the Court to vacate and set aside the verdict and judgment in this cause entered, and to grant it a new trial, upon the following grounds and for the reasons, to wit:

1. Irregularity in the proceedings of the Court occurring at the trial of the cause, and abuse of dis-

cretion by and upon the part of the Court indulged in at the trial, whereby all and singular this defendant was deprived of a fair trial.

2. Errors of law occurring at the trial and during the progress of the cause.

3. That the verdict and the judgment are each and both not justified by the evidence, and are contrary to law.

4. That the Court erred in admitting evidence over the objection of the defendant, and in rejecting evidence offered by the defendant.

5. That the Court erred in charging the jury and in refusing instructions requested to be given by the defendant.

CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Defendant. [23]

[Endorsements]: 215–Tucson. In the U. S. Dist. Court of the Dist. of Arizona. Ignacio Espinosa, etc., Plaintiff, vs. New Cornelia Copper Co., Corporation, Defendant. Motion for New Trial. Filed Oct. 27, 1919. Most Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. C. T. Knapp, Boyle & Pickett, Attorneys at Law, Attorneys for Defendant.

In the United States District Court, District of Arizona.

Minute Entry of Monday, October 27th, 1919.

No. 215 (TUCSON).

IGNACIO S. ESPINOZA, Adm. of Estate of JOSE MARIA OCHOA, Deceased,

Plaintiff,

vs.

NEW CORNELIA COPPER CO., a Corporation,

Defendant.

Minutes of Court—October 27, 1919—Order Denying Motion for New Trial.

This matter came on for hearing this day upon the defendant's motion for a new trial herein, Joseph S. Jenckes, Esquire, appearing on behalf of the plaintiff, and James P. Boyle, appearing on behalf of the defendant, said motion was argued and submitted to the Court, and thereupon it is ordered by the Court that said motion be and the same is hereby denied, to which ruling of the Court, defendant excepts. Thereupon the defendant is granted until November 29th, 1919, to file his bill of exceptions herein and otherwise perfect his appeal. It is further ordered that the bond on appeal be fixed at the sum of $11,000.00 to be approved by the clerk of this court. It is further ordered that plaintiff be allowed an exception to the ruling of the Court making plaintiff elect on which count of his complaint he would proceed to trial.

In the United States District Court, District of Arizona.

Docket No. 215—TUCSON.

IGNACIO ESPINOZA, Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant. [24]

Stipulation Extending Time to November 29, 1919, to File Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED by and between Messrs. Cleon T. Knapp and Boyle and Pickett, attorneys for the defendant in the above-entitled cause, and Messrs. Kibbey, Bennett & Jenckes, attorneys for the plaintiff in said cause, that the time for making, filing, signing and authenticating and allowing a bill of exceptions in said cause, be and the same hereby is extended and enlarged to and until the 29th day of November, 1919.

Witness our hands at Tucson, the 25th day of October, 1919.

CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Defendant.
KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: 215–Tucson. In the U. S. Dist. Court of the Dist. of Arizona. Ignacio Espinosa, etc., Plaintiff, vs. New Cornelia Copper Co., a Corporation, Defendant. Stipulation. Filed Oct. 27/19. Mose Drachman, Clerk. C. T. Knapp, Boyle & Pickett, Attorneys at Law, Attorneys for Defendant.

In the United States District Court, for the District of Arizona.

Docket No. 215—TUCSON.

IGNACIO ESPINOZA, Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,

Defendant.

Order Extending Time to November 29, 1919, for Filing Bill of Exceptions.

UPON APPLICATION therefor, and the stipulation thereto consenting herewith filed and presented, IT IS HEREBY ORDERED that the time within which a bill of exceptions in this cause may be made, filed, executed, signed, authenticated and allowed, be and the same hereby is enlarged and extended to and until the 29th day of November, 1919.

Witness my hand at Tucson, this 25th day of October, 1919.

WM. H. SAWTELLE,
Judge U. S. Dist. Court for the Dist of Arizona.
[25]

[Endorsements]: 215–Tucson. In the U. S. Dist. Court of the Dist. of Arizona. Ignacio Espinosa, etc., Plaintiff, vs. New Cornelia Copper Co., a Corporation, Defendant. Order. Filed Oct. 27/19. Mose Drachman, Clerk. C. T. Knapp, Boyle & Pickett, Attorneys at Law, Attorneys for Defendant.

In the United States District Court, District of Arizona.

Minute Entry of Friday, November 28th, 1919.

No. 215 (TUCSON).

IGNACIO S. ESPINOSA, Administrator,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Minutes of Court—November 28, 1919—Order Granting Thirty Days' Additional Time to File Bill of Exceptions.

It is ordered that the above-named defendant be and is hereby granted thirty days' additional time within which to prepare, tender and file his bill of exceptions herein and othewise prefect his appeal to the Circuit Court of Appeals.

In the United States District Court, for the District of Arizona.

No. 215 (TUCSON).

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

Be it remembered that afterward, to wit, on the 22d day of October, 1919, at a stated term of the said court begun and holding in Tucson in and for the District of Arizona, before his Honor, Wm. H. Sawtelle, District Judge, the issues joined in the above-stated cause between the said parties (*pro ut* the pleadings) came on to be tried to a jury, the said Judge presiding; the plaintiff being represented by Messrs. Kibbey, Bennett and Jenckes, his [26] attorneys; and the defendant by Mr. Cleon T. Knapp and Messrs. Boyle & Pickett, its attorneys; and upon the trial of said issues, after letters of administration were admitted in evidence showing that plaintiff was duly qualified to act as the administrator of the estate of the said Jose Maria Ochoa, deceased, the attorneys of the plaintiff, to maintain and prove the said issues on his part, called as a witness MRS. URELIA OCHOA, the widow of the said deceased, who, being duly sworn, testified as follows:

Testimony of Mrs. Urelia Ochoa, for Plaintiff.

I am the widow of Jose Maria Ochoa. We went from Silverbeel to Ajo and had been residing in Ajo about a month and a few days before the accident. My husband, the deceased, was killed on November 27th, 1918. I am acquainted with the New Cornelia Copper Company at Ajo; it is called the Cornelia Copper Company. My husband was working for the Cornelia Company at the mine on the day of his death. He was working with the drillers, drilling. After he was at Ajo four days he went to work for the company. He worked for the company about a month after he went to work. I know how he was killed—he was blown up by some powder at the time of the New Cornelia Copper Company. I did not see the accident; I do not know the exact place where my husband was killed; I only know what was told me by others. I know he was killed by a powder explosion because they brought him to the house. I did not examine my husband after he was brought to the house because the company would not allow me because he had his head split and was in a white sheet and his head wrapped up. He was dead when they brought him to the house. Juan Delgado and Francisco Morando brought him to his house and they stated to me how he was injured. The officers of the company did not want me to see him because I was in the family way and it might affect me in some way. I did not know the officers. They delivered the body to the men who brought him home. The superintendent of the company stated something to me how this accident happened;

(Testimony of Mrs. Urelia Ochoa.)
that it was not caused by work he was doing there; that it might have been he went there before the time to do his work; that it did not occur where he was working; he told me about my husband being blown [27] up in this explosion. My husband was taken to the hospital after the accident and after he died he was taken home. He left the house to go to work at half-past six in the morning. There are four children of myself and my husband, the deceased, one aged sixteen years, one five years, one one year and eight months and the other one seven months.

Thereupon the attorneys for the plaintiff, to further maintain and prove the said issues on his part, called as a witness JUAN DELGADO, who, being duly sworn, testified as follows:

Testimony of Juan Delgado, for Plaintiff.

Direct Examination.

I knew Jose Maria Ochoa, the deceased; I was going to my work when he was killed; the deceased was near a fire which he, the deceased, had built; the fire was within the lines of the Copper Company. At that time eight or ten more men were with me and the deceased; they were all by the fire; the deceased alone built the fire; I arrived at the place as soon as the deceased built the fire; the others began to come afterwards. The fire was within the land of the company about thirty-five or forty feet to one side of the quarry hole in which the men were supposed to work. We were all going to work in the quarry

(Testimony of Juan Delgado.)

hole that day; we were waiting for our time to go to work. I and the others went to work in the quarry hole after we picked up the deceased. Before the accident the deceased had been working in the quarry hole about a month more or less. After the fire was built the powder exploded. There was some powder under some wood and the deceased didn't know that there was any powder there and he lit some papers there. The powder was under the fire—it was concealed under the wood on the surface. It was not customary for the employees coming to work in the morning to build fires to warm themselves before actually going in to the work. In the mines they use gun powder, dynamite and other explosives. I used powder in working in the mine. I got the powder that I used in the mine from the powder-house; all the workmen there who used powder get it in the same way. A man in charge who works for the Copper Company furnished the powder from the powder-house. The powder used by the men belonged to the New Cornelia Copper Company; the workmen used [28] only that part of the powder furnished each day that was necessary. I do not know where the powder came from that exploded. The day of the accident was a cold day there.

Cross-examination of JUAN DELGADO.

On cross-examination, Mr. Delgado testified as follows: The accident occurred at seven minutes to seven; the deceased, myself and the other men were supposed to begin work at seven o'clock; the de-

(Testimony of Juan Delgado.)

ceased, before the explosion, called me and the other men; I was standing, at the time of the explosion, on the ground six or seven feet from the fire with my back to it; immediately after the explosion the deceased was lying down about eight feet from me; I spoke to him and notified the foreman who came and asked the men to help; I took care of the deceased until an automobile came and took him to the hospital where the doctors took charge of him; I went to the hospital with the deceased where the deceased died at ten o'clock in the morning; I left the hospital and went to my work; there was a path leading to the entrance of the mine, and the fire built by the deceased was about ten or fifteen feet to the side of the road.

THE PLAINTIFF THEREUPON RESTED HIS CASE.

Whereupon counsel for the defendant did then and there move that the Court instruct the jury to return a verdict for the defendant on the following grounds: "That the plaintiff has absolutely failed to show that the death of the intestate arose out of the employment, work or service, or in the course of the work, service, or employment, or due to a condition or conditions of the work, service or employment; and has also failed absolutely to show that the accident which resulted in his death was not caused by his own negligence."

After argument by counsel, the Court, after stating that "whether or not this accident was due to a condition of his employment is not very clear to

(Testimony of Juan Delgado.)

me," remarked as follows: "The testimony shows that it was not customary for the company to leave dynamite and powder, which was in use around the place where the employees congregated to wait the time to go to work—for the time when they were required to go to work. [29] If the testimony showed that, it might be said that that was one of the conditions of the employment, or the situation surrounding it and might be such as to come within that definition, but I am somewhat in doubt as to whether the mere fact that that dynamite was placed there by someone, we don't know by whom, was one of the conditions of the employment. I will allow you to recall this witness or any other witness that may be present to the stand to inquire into that question."

Thereupon plaintiff's counsel recalled the witness JUAN DELGADO, who was heard by the Court in the absence of the jury.

Testimony of Juan Delgado, for Plaintiff (Recalled).

I have observed the handling of powder by the other employees of the mine; they get the powder by means of a report; in my experience I never had powder left at the close of the day, they just give what powder is necessary; if it happened that a little more was given than necessary, it would be returned to the powder-house; I never knew of an instance where powder not used was not returned to the powder-house; I came here as a witness for the company.

(Testimony of Juan Delgado.)

"Mr. JENCKES.—Now, may I cross-examine this witness?

"The COURT.—None of this, as I understand it, is before the jury.

"Mr. JENCKES.—Yes.

"The COURT.—I am anxious to see what you can proved. I may or may not allow it. You may so far as I am concerned."

Mr. Delgado further testifying: I worked for the company a year and a month; during that time there was never any other explosion of powder buried around on the property; this was the only instance I ever heard of where a man was injured on top of the ground by powder, and the only instance I ever knew of where powder was placed around on top of the ground.

Thereupon the Court denied defendant's motion for a directed verdict with the statement following: "I think I will overrule the motion. That is not a question for this Court to pass upon, I think, as requested by counsel. I think that I would do the plaintiff an injustice and I think I shall resolve the doubt in favor of the plaintiff." Counsel for the defendant excepted to the ruling of the Court denying the said motion for a [30] directed verdict whereupon the Court allowed the exception and ordered it to be noted. The statement aforesaid of the evidence of Urelia Ochoa and Juan Delgado contains all the evidence affecting the matter to which the exception to the ruling denying a directed verdict relates.

(Testimony of Charles W. McHenry.)

The COURT.—"You don't offer any of this testimony?" (Referring to testimony of Delgado given in absence of the jury.)

Mr. JENCKES.—"No, I withdraw it."

The motion for a directed verdict having been denied, the defendant, on its own behalf, called CHARLES W. McHENRY, who, being duly sworn, testified as follows:

Testimony of Charles W. McHenry, for Defendant.

I am the mine foreman for the defendant company; I have been employed by defendant for one year and two months; the deceased was employed as a miner at the time of his death; the deceased's duties were running a jack-hammer and blasting; on the day the deceased was killed, he was supposed to work in the glory hole, which is an outcropping of ore that had been mined from thirty to seventy-five feet below the level of the surrounding country; the deceased's duty was to drill inside of the edge of said glory hole and let the rock cave to the bottom; it was not deceased's duty to light any fires either to warm himself or for any other purpose; the defendant company has no particular rule about lighting fires, but drys and stoves are furnished, and the men are asked not to build fires to warm themselves; I do not know whether there were any such drys or houses on the morning deceased was killed, but it is the practice to provide a place for the men; I was new on the ground at the time the deceased was killed; the place of the explosion where deceased was killed was

(Testimony of Charles W. McHenry.)

twenty or thirty feet from the rim of the glory hole, which is from thirty to seventy-five or eight feet deep and approximately two hundred feet long; the place where the deceased would be working was two hundred feet, more or less, from the place where the explosion occurred; eight or ten minutes before seven o'clock in the morning, there was an explosion which should not have occurred at that particular time, [31] and was out of the ordinary; I stepped to the door of the office and looked towards the glory hole, not knowing exactly what could have happened, and saw two or three men lying on the ground; I immediately phoned the hospital and called for an ambulance, knowing from the looks of the men that somebody must have been hurt; one of the men ran up to the office and said, "three or four men have been blasted"; I ran down and encountered, first of all, the deceased, who was lying on the ground with his head cut, but still alive; at the time I called the hospital, I looked at the watch while I was waiting for the doctor to answer, and I think it was seven or eight minutes of seven to be exact; the deecased was not working at the time of the accident; the defendant company kept a powder-house with a man in charge on each level, where its men were working; if a few men are working, the shift-boss is also in charge of the powder magazine; the bosses are supplied with order books which state the number of sticks of powder, the number of feet of fuse, and the number of caps to be used; at the bottom of the order is the number of the miner who gets the order; the order

(Testimony of Charles W. McHenry.)

has to be signed by the shift-boss for a man to get powder; the man asks the shift-boss for the exact amount of powder that is needed, and the order is based upon the man's request; all powder not used shall be returned immediately to the powder-house; there are instances, rather rare, where a man orders enough powder for filling all holes and something has happened, a hole has caved, and he can't get the powder in, and there is a stick that is to be returned; the rule is that the powder is to be returned to the powder-house; *that* are times when men have powder left over; unless the men return the powder left over to the powder-house, I do not know what they might do; it is possible that some powder left over might not be returned to the powder-house; it is done; I do not know whether deceased was killed by dynamite or powder, or whether the powder or dynamite was owned or controlled in any way by defendant company; in my experience with the company, there was never an explosion such as occurred when the deceased was killed; I do not recall a case [32] where an explosion occurred of powder or dynamite left upon the surface or placed around for safekeeping; there had been other unexpected powder explosions in the mine, but none that I recall from powder that had been left around or placed anywhere for safekeeping; on my recommendation, made immediately after I started to work on September 1st, 1918, the defendant company provided drys for the men, places for the men to warm by, and the company asked the men not to build fires outside, but I could

(Testimony of Charles W. McHenry.)

not say positively that such places were working at the time deceased was killed; before the time of the accident, the weather was too warm for the men to build fires around; when I first landed on the job, I asked for a dry on account of the men being wet below, and not because of weather conditions on top; the men on the surface had no use, particularly, for a fire until along about the first of the year; the entrance where the deceased would go into the glory hole was about thirty feet away from the fire, and after he got into the glory hole, he would walk under the rim of it some way to his place of work, a gradual incline from the rim of the glory hole down to the bottom; neither powder nor dynamite would be placed at the spot where the deceased was killed to be used in the work in the mine; I presume it had been placed there, since there was an explosion, but whether it was powder or dynamite I could not say; the powder used by the company was Hercules 40%, commonly called giant powder.

Thereupon Mr. PETER R. BRADY was called as a witness on behalf of the defendant, and, being duly sworn, testified as follows:

Testimony of Peter R. Brady, for Defendant.

I had worked two years as shift boss for the defendant company; my foreman was Mr. McHenry; the deceased's duties were drilling and blasting ground; at the time of the accident, there were orders that any powder left over after the holes were filled was to be returned to the powder-house; the powder

(Testimony of Peter R. Brady.)

was kept in a little powder-house built of corrugated iron about three hundred feet from where the accident occurred; I had charge of the powder when I was on shift; the shift boss is supposed to measure the [33] holes after they are drilled and more or less determine the amount of powder that is to be used; when the men get through drilling, the powder is issued to them, and there is a note made of the powder issued, and if there is any powder left through some accident to the hole, being filled or caved in, the men are supposed to return it to the powder-house; I do not remember that there were any instructions on the day of the explosion with reference to building fires around the property, but we would not allow the men to build any fires amound the works on account of the lumber that was piled up there; my instructions were not to allow the fires anywhere around the works; when the men did not return powder left over, there had to be some kind of an accounting, because I was responsible for the powder that they used; by the rule regarding the return of left-over powder to the powder-house, I mean the men were supposed to avoid danger in leaving powder scattered around the works; as far as I can recall, the men on my shift always obeyed these instructions; I cannot say about the other shift; there possibly may have been instances where powder was not returned to the powder-house according to instructions, but I do not recall any such, and I have been on the works two years.

Thereupon JUAN DELGADO was called on behalf of the defendant and testified as follows:

Testimony of Juan Delgado, for Defendant.

Mr. KNAPP.—"Now, Mr. Delgado, what, if anything, did Mr. Ochoa say to you immediately before the accident?

A. He says, Ochoa told me, "Come over near the fire; it is fifteen minutes yet to go to our work."

Thereupon the defendant rested its case and the jury having been excused, defendant's counsel made the following motion: "I move the Court at this time to instruct the jury to return a verdict in favor of the defendant company, on the ground and for the reason that plaintiff has fully failed to show that the accident which resulted in the death of plaintiff's intestate arose out of or in the due course of his employment, or due to a condition or conditions of his employment, and has fully [34] failed to show that plaintiff's intestate was not guilty of negligence, and has failed to show that he was at work in his occupation, and that the accident was occasioned by a risk or danger inherent to his occupation, and failed to show any pecuniary loss or damage, and for the further reason that no question of fact is presented for the jury to determine, as the facts are uncontradicted as to the manner in which plaintiff's intestate met his death."

Whereupon counsel for plaintiff remarked that the motion was a sort of repetition of the previous motion for a directed verdict and the Court said, "Except upon the ground that you have not proven any pecuniary loss or damage."

(Testimony of Juan Delgado.)

Thereupon there took place between counsel and the Court the following discussion:

"Mr. JENCKES.—It seems to me, if your Honor please, we have proven the death of this man, is it necessary to go to the full extent and show how long he would live. It is my idea that your Honor held that those matters of proof are unnecessary.

"The COURT.—No, I never said it was unnecessary. On one or two occasions when the American Mortality Tables were offered after the proof of the death, I did say—well, I don't know but what the Court will take judicial notice of those tables without their being introduced in evidence. * * * In that case, to either introduce them, or call a witness to give testimony with reference to them, or call upon counsel on the other side to stipulate that by those tables a man who was twenty-five, his expectancy of life was so many years. There has not been anything of that sort in this case. I don't know what the age of the deceased was, therefore I could not charge the jury as to the mortality tables.

"Mr. JENCKES.—I think I overlooked that, if your Honor please, in the consideration of the other questions which seemed of more importance, and if your Honor will allow me to put that in. It is merely a matter of telling how old this man was, and how much he was drawing at the time he was injured. [35]

"The COURT.—Well, the Court has the discretion to allow it, but it is mighty bad practice.

"Mr. JENCKES.—I realize that it is. The attor-

ney should put those things in at the beginning, but it is a case that I overlooked it.

"The COURT.—Well, I suppose in the interest of justice, if the plaintiff is entitled to recover, I should grant you permission to do that. What does the defense say?

"Mr. KNAPP.—I didn't want to interrupt the Court.

"The COURT.—All right. As a matter of fact, I started to suggest it, but I didn't know whether it was proper for me to do so after you had rested without offering that proof, and inasmuch as I had made one suggestion that there were children surviving, it was not proper for me to make another one as to the compensation that the plaintiff was receiving and what his age was, so I refrained from doing so."

The defendant then objected to the reopening of the case for the purpose of allowing plaintiff to introduce evidence as to the expectancy of life of plaintiff's intestate or as to the wages the intestate was receiving at the time of his death.

The objection was overruled and defendant's counsel asked for an exception which was allowed and ordered noted.

The jury was thereupon recalled and Urelia Ochoa again took the stand on behalf of the plaintiff and testified that the deceased was forty-three years of age at the time of his death and that at that time he was receiving four dollars and five cents a day.

It was then agreed that at the age of forty-three, the expectancy of life is 25.99 years.

Thereupon the second motion aforesaid for a directed verdict in the following words, to wit: "I

move the Court at this time to instruct the jury to return a verdict in favor of the defendant company on the ground and for the reason that plaintiff has fully failed to show that the accident which resulted in the death of plaintiff's intestate arose out of or in the due course of his employment, or due to a condition or conditions of his [36] employment, and has fully failed to show that plaintiff's intestate was not guilty of negligence, and has failed to show that he was at work in his occupation and that the accident was occasioned by a risk or danger inherent to his occupation, and failed to show any pecuniary loss or damage, and for the further reason that no question of fact is presented for the jury to determine, as the facts are uncontradicted as to the manner in which plaintiff's intestate met his death," was considered by the Court, and the Court denied it, whereupon defendant's counsel asked for an exception which by the Court was allowed and ordered noted. It was stated by the Court that this second motion would be considered at the close of all the testimony after the Court reopened the case for plaintiff. All of the evidence set out in this bill of exceptions of Urelia Ochoa, Juan Delgado, Charles W. McHenry, and Peter R. Brady, together with the stipulation that at the age of forty-three, the expectancy of life is 25.99 years, constitutes all of the evidence introduced in the case affecting the matter to which the exception to the Court's ruling denying the second motion for a directed verdict relates.

Thereupon both sides having rested, the Court instructed the jury as follows:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

1. As you have been told by counsel, this is an action brought under the Employers' Liability Law of the State of Arizona, by the plaintiff, as administrator of the estate of Jose Ochoa, deceased, for the benefit of the widow and minor children of the deceased, against the New Cornelia Copper Company, a corporation, to recover from said defendant corporation damages alleged to have been suffered by the said estate by reason of the death of said deceased which it is claimed, resulted from an accident arising out of and in the course of the decedent's employment, and due to a condition or conditions of such occupation and employment.

It is alleged that the accident occurred on the 18th day of November, 1918, at the mines of the defendant company at [37] Ajo, Pima County, Arizona, while the deceased was in the service and employment of the defendant as a miner.

Before the plaintiff may recover against the defendant in this case, he must show and prove to your satisfaction by a preponderance of the evidence that his intestate, Jose Ochoa, at the time he received the injury from which he afterwards died, was an employee of the defendant, and he was then and there, —that is, at the time and place mentioned in the complaint, engaged in the course of his said employment, and that the accident which resulted in his death was due to a condition or conditions of such occupation and employment, and that his death was not caused solely by his own negligence. Also, that

the said Ochoa left him surviving a widow and minor children. If you believe from the evidence in the case that the plaintiff has shown and proven by a preponderance of the evidence the foregoing facts, then I instruct you that your verdict should be for the plaintiff.

This action is brought under and by virtue of Chapter 89 of the Session Laws of the First Legislature of the State of Arizona, and is entitled "An Act to Provide for Employers' Liability for Injuries to Workmen in Dangerous Occupations." It is known and called the Employers' Liability Law. Section 2 of that Act is as follows: "That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article 18 of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured." Section 3 provides: "The labor and service of workmen at manual and mechanical labor, in the employment of any person, firm, association, company or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous [38] occupation within the meaning of the terms of the pre-

ceding section." And I charge you, as a matter of law, that mining is one of the occupations enumerated in the law as being hazardous.

Now, under the provisions of the act, an employer in certain hazardous occupations, among them mining, is liable for the personal injury or death of an employee by an accident arising out of and in the course of such labor, service or employment, and due to a condition or conditions of such occupation or employment in all cases where such injury or death of said employee shall not have been caused by the negligence of the employee killed or injured, and in such case the employer—in this case the company—is liable even though he himself be wholly free from fault or negligence.

It is not claimed in this case, and it could not be claimed in an action of this kind under this Employers' Liability Law, that the defendant company was negligent in any respect. The liability created by the law under which this suit is brought is not a liability for negligence, but it is a liability for injury or death due to a condition or conditions of the occupation or employment as herein defined. The term "due to a condition or conditions of such occupation or employment" as used in these instructions means more than that the accident in question in which Ochoa was killed arose out of and in the course of the work he was doing or was employed to do. They mean the inherent risks and dangers of his occupation or employment which were not avoidable by him.

Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona,

such injury must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Therefore, if you find that at the time Ochoa received the injury which caused his death, he was not at work in his occupation for the defendant, or if you find that such injury was not occasioned by a risk or danger inherent to such occupation, your verdict must be for the defendant. [39]

Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, it must have been due to a condition or conditions of the occupation, and an injury cannot be said to have been due to a condition or conditions of the occupation unless the employee at the time of the injury was rendering work, service or labor for his employer. Therefore, if you find that at the time he received the injury which caused his death, the plaintiff's intestate, Ochoa, was not rendering work, service or labor for the defendant, your verdict must be for the defendant.

You are further instructed that if you find from the evidence in this case that the plaintiff's intestate, Ochoa, at the time of his death had gone upon the defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him to go to work, then the said Ochoa was engaged in a hazardous occupation under the Employers' Liability Law, and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work. It is my opinion

that an employee regularly employed in a mine who a few minutes, say, four or five minutes before the time for his entering upon his work, entered upon the property of his employer at a point in close proximity to where he was to work, and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer, and is engaged in a hazardous occupation within the meaning of the Employers' Liability Law, so that when I gave you those two charges which are to the effect that if you find at the time that Ochoa received the injury which caused his death, he was not rendering work, service or labor for the defendant, your verdict should be for the defendant, it is with the qualification which I have just stated, and I further charge you, as I have just previously done, that in my opinion, under all the facts and circumstances of this case, that the plaintiff was doing work, service and employment for the defendant company at the time this accident occurred. That is my conclusion from all the facts detailed in this case. However, I [40] think there is a legal conclusion to be drawn from the facts, and in this connection I might say that it devolves upon the Court to state to you the law governing this case. If, in so doing, I state the testimony, I shall only do it for the purpose of calling your attention to it. If I intimate an opinion on the disputed questions of fact, you are not to be governed by it, unless it corresponds with your ideas as to what the facts are. I determine the law, and you determine the facts.

You are made by the law the sole judges of the facts

in this case, and of the credibility of each and all of the witnesses who have testified in the case, and in determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive he may have, if any be shown, and the probability or improbability of his statements, when considered in connection with all the other facts and circumstances of the case.

Now, the first question to be presented to you is whether the deceased at the time and place mentioned in the complaint, and while in the service and employment of the defendant company, in the course of his labor, service or employment, received an injury which caused his death. If you answer this question in the affirmative—that is, if you find that the deceased in the course of his labor, as I have defined that term, and while in the service or employment of the defendant, received the injury complained of which caused his death, then you will determine whether such injury so received by the deceased was due to a condition or conditions of his occupation or employment as I have defined that term before you, and if you believe from the evidence in this case that the deceased was so injured and that such injury was suffered or caused by an accident arising out of such service, or employment, and that the same was due to a condition or conditions of such occupation or employment, if you find that, I say, if you find all of those things in favor of the plaintiff, then you must consider whether such injury or injuries were caused

by the negligence of the deceased, Ochoa, [41] because the statute provides that if such injuries were caused by the negligence of the deceased himself, then his administrator cannot recover in this action, and your verdict must be for the defendant.

I say, if you come to the conclusion that the injury described was caused by the deceased's own negligence, then the administrator cannot recover, and you need not go any further in the case at all, but you will stop there, and render your verdict for the defendant.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. The essence of the fault may lie in omission or commission; the doing or the failure to do, and the duty is dictated and measured by the exigencies of the situation.

As I have stated, the burden is upon the plaintiff to establish every material allegation of his complaint by a preponderance of the evidence. There is no burden upon the defendant to explain the accident or the cause of it, or to show it was caused by the negligence of Ochoa, if it was so caused. The burden of proving that the accident was due to a condition or conditions of Ochoa's occupation or employment, as defined by the Court, and that it was not caused by his negligence, rests upon the plaintiff, and by "burden of proof" as used in these instructions is meant this: That the party upon whom the burden of proof devolves must make out his case by a pre-

ponderance of the evidence, and by "a preponderance of evidence" is meant the greater weight of evidence.

Now, if you find that the plaintiff is entitled to recover some amount as damages, then in order to enable you to determine what amount should be awarded, it is not necessary that any witness should have sworn or given testimony as to the amount to which the administrator would be entitled to recover. In this case the testimony shows that the deceased left surviving him a widow and three or four minor children dependent upon him, and the Employers' Liability Act just quoted provides that the recovery, if any, shall be for the benefit of the widow and minor children, and if you find [42] that the plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the evidence in the case, and it is for you to say, in the exercise of sound discretion, without fear and without favor, and without considering whether the plaintiff is poor and the corporation is or may be rich, what amount of damages may be awarded. In other words, you are to determine this case just as though the parties interested were total strangers to you, and you did not know the financial situation of either one of the parties. Now, such damages should be computed or estimated by the probable accumulations of a man of the deceased's age, habits, health and pursuits during his probable lifetime. You are to consider his earnings, the amount of wages he was receiving at the time of his death, and if you find that the plaintiff is entitled to any damages as compensation, those damages must be com-

pensatory and not punitive—not a punishment of the company, and nothing shall be allowed as a solace to the wounded feelings or mental suffering, or for the loss of the society of the deceased to this family, or for any pain or suffering which the deceased or his relatives may have sustained, if he was conscious and did suffer any before he died. I say, you should not award in this action, under this statute, any damages for such suffering, if any there was, nor can you award anything to the widow because of the fact that she is aggrieved for the loss of her husband. In other words, gentlemen, if you should find that the estate is entitled to damages, you can allow only such damages as will make good the pecuniary loss sustained by the plaintiff administrator for the benefit of the surviving widow and children. You are limited to ascertaining from the evidence in this case, and from the evidence alone, the actual, pecuniary loss sustained in dollars and cents, as near as you can approximate the same, and in that amount only can you return a verdict for the plaintiff. Some people have general idea that in a damage case that a sum should be awarded which placed at interest, we will say eight per cent, would earn an amount equal to the wages which were being received by the deceased at the time of his death, but I think you can readily see that that would not be a proper [43] method of arriving at the pecuniary award in this case, because if that rule were followed, as stated by counsel, at the end of the time when the children would not longer be dependent upon the support of the father, they would not only have had the interest, the full

amount of the wages during all of those years, but at the end of that time, they would still have the principal sum.

Now, you will remember that something has been said regarding the American Mortality Tables. The testimony *is* this case shows that the deceased at the time of his death was forty-three years of age, and according to the American Mortality Tables, the probable duration of the life of a person of that age is estimated at approximately 25.99 years. Now, these American Mortality Tables are framed upon the basis of the average duration on the lives of a great number of persons who were born and brought up in the United States. Whether there is any different rule prevailing as to those who were born and brought up in Mexico, or who are of that nationality, I don't know; I am not informed, and therefore I cannot enlighten you on that subject. It may be that you will come to a conclusion that there should be a different rule, and on the other hand, it may be that you will come to a conclusion that the same rule should be followed, and should prevail, but it has been held that the rules to be derived from such tables may not be the absolute guide of the judgment and conscience of a jury in a case of this character. The Courts say that the jury may, however, consider such tables in connection with all the other evidence in the case, and as above stated, if you find for the plaintiff, you should award a fair and reasonable compensation, no more, no less, taking into consideration what the deceased's income was; what it would probably have been in the future; how long it would last;

whether he would have been constantly employed; whether he would have at all times been in perfect health and been able to earn that amount of wages from year to year; how much he might have saved from those earnings, and all of those contingencies to which he is liable. Now, if you find for the plaintiff under the instructions I have given you, you must not render what is known as a quotient verdict. That is, you must not add together the [44] amount of the sums which each of you think he is entitled, and divide it by twelve or any other number. Such a method or any similar method of arriving at the plaintiff's compensation would be improper.

Now, if you find for the plaintiff, the form of your verdict will simply be, "We, the jury, duly impaneled and sworn in the above-entitled cause, upon our oaths do find for the plaintiff administrator, for the benefit of the widow and children, in the sum of" so many dollars, inserting or writing in the blank form of verdict the amount of which you think the plaintiff is entitled. If you find for the defendant, the form of verdict will be "We, the jury, find for the defendant." Any exceptions on the part of the plaintiff to the general charge?

Thereupon defendant's counsel excepted as follows to the instructions of the Court:

"Mr. KNAPP.—The defendant excepts to the instructions given by the Court, number 1 requested by the plaintiff. The defendant excepts to the refusal of the Court to give instructions number 3 and 4 requested by the defendant. The defendant excepts to the general instructions given by the Court, and to

all of the same, where reference is made to the fact that if plaintiff's intestate was on the property seven or eight minutes before the time to go to work, and waiting to go to work, that he was engaged in a hazardous occupation, under the Employers' Liability Law, regardless of the fact that he had not yet gone down into the mine to work. The defendant excepts further to the general instructions, and all of the same, wherein reference was made to the damages that might be assessed by the jury in this case based upon any condition of health, pecuniary loss or damage, as there is no evidence on those points."

Whereupon the Court further instructed the jury as follows:

"The COURT.—The condition of health is right, and I will withdraw the statements of that portion of the charge in which [45] I instructed the jury in estimating the amount of damages, if any, to the plaintiff that might be recovered, they may consider, among other things, the deceased's condition of health, because I believe that there was no direct proof as to what his condition of health was. There was, however, evidence that the plaintiff worked in the mine as a miner a month or more previous to the date of the accident, and the jury instead of considering my instructions, calling attention to the condition of health, may look to the fact, if it be a fact, that he had worked as a miner, and the amount he was then receiving, they may consider that in connection with all the other elements which I mentioned in my general charge."

The foregoing constitute all of the instructions.

The Court then allowed defendant's exception to the giving of instruction number one requested by plaintiff and ordered that such exception be noted. Said instruction number one requested by plaintiff was as follows, to wit:

"You are instructed that if you find from the evidence in this case that the plaintiff's intestate, Jose Maria Ochoa, at the time of his death, had gone upon defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him to go to work, then the said Jose Maria Ochoa was engaged in a hazardous occupation under the Employers' Liability Law regardless of the fact that he had not yet gone down into the mine to work."

The Court then allowed defendant's exception to the refusal to give defendant's requested instructions number three and four and ordered the exception to be noted. Said instructions numbers three and four were as follows, to wit:

3. "If you find that the intestate, Ochoa, in lighting a fire, which fact is uncontradicted, was doing an act outside the duties of his work, service and employment, you must find for the defendant company."

4. "You are instructed that there is no evidence in this case that the powder or dynamite, which caused the death of [46] the intestate, Ochoa, was ever owned or under the control of the defendant company."

The Court then allowed defendant's exception to

the Court's instruction to the effect that if plaintiff's intestate was on the property seven or eight minutes before the time to go to work and there and then waiting to go to work, that he was engaged in a hazardous occupation under the Employers' Liabilty Law, regardless of the fact that he had not yet gone down into the mine to work; and ordered such exception to be noted.

The Court then allowed defendant's exception to the court's instruction with reference to any pecuniary loss or damage that may have been suffered by plaintiff for the benefit of the widow and minor children of the intestate, the exception being for the reason that there was no evidence as to any pecuniary loss or damage; and such exception was ordered to be noted.

The Court then allowed defendant's exception to the instruction qualifying defendant's requested instructions numbers one and two which were given by the Court, and ordered the exception to be noted. Said instructions numbers one and two are paragraphs seven and eight of the Court's instructions and the instruction of qualification is paragraph nine of the Court's instruction.

And the Court also allowed defendant's exception to the Court's instruction with reference to whether or not plaintiff's intestate was at work at the time of the accident and engaged in a hazardous occupation which exception was also ordered to be noted.

The evidence hereinbefore set out in this bill of exceptions, contains the substance of all of the testimony given on the trial and constitutes all of the

evidence upon which the Court's instructions aforesaid were based and affecting the matters to which defendant's exceptions to said instructions and refusals to instruct relate.

Thereafter the jury returned a verdict of $10,000.00 in favor of the plaintiff. [47]

Thereupon defendant's counsel moved that the verdict be set aside on the ground that the verdict is not justified by the evidence. The motion was denied and upon defendant's request an exception was allowed and ordered noted.

Thereupon defendant's counsel moved for judgment notwithstanding the verdict on the ground that a verdict and judgment for the defendant were the only verdict and judgment that would be supported by the evidence. The motion was denied and upon defendant's request an exception was allowed and ordered noted.

Thereafter judgment was entered for the plaintiff for $10,000.00 and costs.

Thereupon defendant's counsel made a motion for a new trial.

The Court denied defendant's motion for a new trial and upon defendant's request an exception was allowed and ordered noted.

The Court then caused an order to be entered giving defendant until November 29, 1919, to prepare its bill of exceptions and have it duly signed and filed.

And now, within the time aforesaid so allowed therefor, to wit: On the 28th day of November, 1919, the defendant does now present this, its bill of ex-

ceptions, and asks that the same may be examined, approved and allowed by the Court and filed and made and deemed to be and held a part of the record in this cause.

The defendant prays that this bill of exceptions may be allowed, settled and signed.

CLEON T. KNAPP,
BOYLE and PICKETT,
Attorneys for Defendant.

We agree to the foregoing proposed bill of exceptions and have no objections to make thereto.

KIBBEY, BENNETT and JENCKES,
Attorneys for Plff.

11/26/19.

[Endorsements]: Received a copy of the within bill of exceptions, and service of same is admitted this 26th day of November, 1919. [48]

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 215—Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Bill of Exceptions. Filed Dec. 12, 1919, C. R. McFall, Clerk. Cleon T. Knapp, Bisbee, Arizona, Boyle & Pickett, Douglas, Arizona, Attorneys for Defendant.

In the United States District Court for the District of Arizona.

No. 215—TUCSON.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Order Approving Bill of Exceptions.

The defendant, having served its proposed bill of exceptions upon the plaintiff, the said bill of exceptions is duly filed and served herein, and the counsel for the respective parties having agreed that said bill of exceptions is correct, it is hereby certified that said bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, and constitutes all the substantial testimony therein material to the issue and contains the instructions of the Court and exceptions to said instructions and refusals to instruct, and it is

ORDERED that said bill of exceptions be and it hereby is approved, settled and allowed this 12th day of December, A. D. 1919, in term.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. 215 — Tucson. In the United States District Court for the District of Ari-

zona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased. Plaintiff, vs. New Cornelia Copper Company, a Corporation. Defendant. Order Approving Bill of Exceptions. Filed Dec. 12, 1919. C. R. McFall, Clerk. Cleon T. Knapp, Attorney at Law, Bisbee, Arizona. Boyle & Pickett, Attorneys at Law, Douglas, Arizona, Attorneys for Defendant. [48–a]

In the United States District Court, for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

And now comes New Cornelia Copper Company, defendant in the above-entitled action and says: That on October 22, 1919, a jury duly empaneled in the above case, returned a verdict for the plaintiff for the sum of Ten Thousand ($10,000.00) Dollars, and on motion of the plaintiff, opposed by the defendant, the Court ordered that judgment be entered in favor of the plaintiff in accordance with the said verdict, in which order, instructions, proceedings and proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of the de-

fendant, all of which will in more detail appear from the Assignment of Errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings and the papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals. [49]

CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Defendant.

Dated December 12, 1919.

Service of a copy of the within petition for writ of error is hereby admitted this 15th day of December, A. D. 1919.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 215 — Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Petition for Writ of Error. Filed Dec. 16, 1919. C. R. McFall, Clerk. By Effie D. Botts, Chief Deputy Clerk. Cleon T. Knapp, Bisbee, Arizona, Boyle & Pickett, Douglas, Arizona, Attorneys for Defendant.

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant, New Cornelia Copper Company, and files herewith its following assignment of errors in connection with and as a part of its petition for a writ of error filed herein, which it avers were committed by the Court in the proceedings in said cause before and after the rendition of said judgment appearing in the records herein, and upon which assignment of errors it will rely in the prosecution of the writ of error in the above-entitled cause from the said judgment herein entered:

I.

The Court erred in refusing to grant motion made by defendant after the plaintiff had rested his case, to instruct the jury to return a verdict for the defendant, on the ground and for the reason that the plaintiff had absolutely failed to show that [50] the death of the intestate arose out of the employment, work or service, or in the course of the work, service or employment, or due to a condition or conditions of the work, service or employment, and had

also failed absolutely to show that the accident which resulted in the death of plaintiff's intestate was not caused by his own negligence.

II.

The Court erred in refusing to grant motion made by defendant when both plaintiff and defendant had rested their case, to instruct the jury to return a verdict in favor of the defendant, on the ground and for the reason that the plaintiff had fully failed to show that the accident which resulted in the death of the plaintiff's intestate arose out of, or in the due course of his employment, or due to a condition or conditions of his employment, and had fully failed to show that the plaintiff's intestate was not guilty of negligence and had failed to show that he was at work in his occupation and that the accident was occasioned by a risk or danger inherent to his occupation and had failed to show any pecuniary loss or damage and for the further reason that no question of fact was presented for the jury to determine.

III.

The Court erred, in permitting the plaintiff to reopen the case, over defendant's objection, after both plaintiff and defendant had rested, and after defendand had made its motion for a directed verdict, for the purpose of introducing evidence as to the expectancy of life of the plaintiff's intestate, and as to the wages which plaintiff's intestate was receiving at the time of his death.

IV.

The Court erred in refusing to grant the motion made by defendant when both plaintiff and defendant had rested their case, and after the Court had permitted the plaintiff to reopen his case, over defendant's objection, to introduce testimony as to the life expectancy of plaintiff's intestate, and the wages earned by plaintiff's intestate at the time of his death, to instruct the jury to return a verdict in favor of the defendant on the ground and [51] for the reason that plaintiff had fully failed to show that the accident which resulted in the death of plaintiff's intestate arose out of or in the due course of his employment, or due to a condition or conditions of his employment, and had fully failed to show that plaintiff's intestate was not guilty of negligence, and had failed to show that he was at work in his occupation and that the accident was occasioned by a risk or danger inherent to his occupation and failed to show any pecuniary loss or damage and for the further reason that no question of fact was presented for the jury to determine.

V.

The Court erred in giving the following instructions to the jury: "You are further instructed that if you find from the evidence in this case that the plaintiff's intestate, Ochoa, at the time of his death, had gone upon the defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him to go to work, then the said Ochoa was engaged in a hazardous occupation under the Employers' Lia-

bility Law, and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work." To which instructions defendant excepted and the same was noted.

VI.

The Court erred in giving the following instructions to the jury: "It is my opinion that an employee, regularly employed in a mine, who a few minutes, say four or five minutes, before the time for entering upon his work, enters upon the property of his employer at a point in close proximity to where he was to work and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardous occupation within the meaning of the Employers' Liability Law"; to which instruction the defendant excepted and same was noted.

VII. [52]

The Court erred in giving the following instructions to the jury: "I further charge you, as I have previously done, that in my opinion under all the facts and circumstances of this case, that the plaintiff was doing work, service and employment for the defendant company at the time this accident occurred. That is my conclusion from all the facts detailed in this case," to which instruction the defendant excepted and the same was noted.

VIII.

The Court erred when, after giving the following instructions to the jury:

"Before an employee may recover for injury under the Employers' Liability Act of the state of Arizona, such injury must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Therefore, if you find that at the time Ochoa received the injury which caused his death, he was not at work in his occupation for the defendant, or if you find that such injury was not occasioned by the risk or danger inherent to such occupation, your verdict must be for the defendant."

And

"Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, it must have been due to a condition or conditions of the occupation, and an injury cannot be said to have been due to a condition or conditions of the occupation unless the employee at the time of the injury was rendering work, service or labor for his employer. Therefore, if you find that at the time he received the injury which caused his death, the plaintiff's intestate, Ochoa, was not rendering work, service or labor for the defendant, your verdict must be for the defendant."

he qualified the same by stating: "So that when I gave you those two instructions, which are to the effect that if you find at the time that Ochoa received the injury which caused his death, he was not rendering work, service or labor for the defendant, your

verdict will be for the defendant, it is with the qualifications which I have just stated."

The qualifications being that if Ochoa "had gone upon the defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him to go to work, then the said Ochoa was engaged in a hazardous occupation under the Employers' Liability Law and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work. [53] It is my opinion that an employee regularly employed in a mine, a few minutes, say four or five minutes, before the time for his entering upon his work, enters upon the property of his employer at a point in close proximity to where he was to work, and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardous occupation within the meaning of the Employers' Liability Law.

IX.

The Court erred in giving the following instructions to the jury: "Such damages should be computed or estimated by the probable accumulations of a man of the deceased's age, habits of life during his probable lifetime. . . . You are limited to ascertaining from the evidence in this case, and from the evidence alone, the actual pecuniary loss sustained in dollars and cents as near as you can approximate the same and in that amount only can you return a verdict for the plaintiff." For the reason

that there is no evidence in the case or testimony upon the part of any witness that the estate or the surviving widow and children suffered any pecuniary loss or damage by reason of the death of plaintiff's intestate. And the verdict of the jury and the judgment entered thereon are wholly unsupported by any evidence or testimony of pecuniary loss or damage to the estate, the surviving widow and children or any person or persons.

IX.

The Court erred in giving the following instruction to the jury: "In this case the testimony shows that the deceased left surviving him a widow and three or four minor children depending upon him, and the Employers' Liabilty Act just quoted provides that the recovery, if any, shall be for the benefit of the widow and minor children." For the reason that there is no evidence or testimony in the case that the widow and minor children of the deceased were in any way or to any extent whatsoever dependent upon decedent.

X.

The Court erred in refusing to give the following instruction to the jury, requested by the defendant. "If you find [54] that the intestate Ochoa in lighting a fire, which fact is uncontradicted, was doing an act outside the duties of his work, service and employment, you must find for the defendant company."

XI.

The Court erred in refusing to give the following instruction to the jury requested by defendant:

"You are instructed that there is no evidence in this case that the powder or dynamite which caused the death of the intestate Ochoa, was ever owned or under the control of the defendant company."

XII.

The Court erred in failing to instruct the jury to apportion any damages that might be returned in favor of plaintiff, between the surviving widow and minor children of the plaintiff's intestate, and the verdict of the jury rendered herein and the judgment entered thereon are improper and insufficient in that the jury had failed to apportion the damages awarded as between the surviving widow and minor children of plaintiff's intestate.

XIII.

Because the evidence at the trial was insufficient to justify the verdict of the jury in this, viz: For the reason that there was no evidence introduced at the trial on the part of either plaintiff or defendant proving or tending to prove directly or by inference that the death of plaintiff's intestate was not caused by his own negligence.

XIV.

Because the verdict of the jury and the judgment entered thereon is against the law; and wholly unsupported by the evidence.

XV.

The Court erred in denying the motion of the defendant to set aside the verdict of the jury herein on the ground that said verdict was not justified by the evidence.

XVI.

The Court erred in denying the motion of defendant for judgment, notwithstanding the verdict on the ground that a verdict and judgment for the defendant were the only verdict and judgment [55] that could be supported by the evidence.

XVII.

The Court erred in denying the motion of the defendant for a new trial by reason of the matters and things all and singular, set out in the foregoing assignment of errors and contained in a motion for a new trial, all of which appear in the records in this cause.

WHEREFORE the defendant prays that for said manifest errors the judgment of the Court should be reversed.

CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Defendant.

Dated December 12th, 1919.

Service of a copy of the within Assignment of Errors is hereby admitted this 15th day of December, A. D. 1919.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 215 — Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Assignment of Errors. Filed Dec. 16,

1919. C. R. McFall, Clerk. By Effie D. Botts, Chief Deputy Clerk. Cleon T. Knapp, Bisbee, Arizona, Boyle and Pickett, Douglas, Arizona, Attorneys for Defendant.

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

This matter coming on this day regularly to be heard upon the application of the defendant, by its attorneys, for the allowance of a writ of error, upon its petition presented to the Court praying for the allowance of a writ of error on the assignment [56] of errors intended to be urged by it, and praying also that a transcript of the record and proceedings and papers from which the judgment was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof the Court does allow writ of error upon defendant giving bond according to

law, in the sum of Eleven Thousand ($11,000.00) Dollars.

Dated December 16th, 1919.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Service of a copy of the within order allowing writ and fixing bond is hereby admitted this 15th day of December, A. D., 1919.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

No. 215—Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased. Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Order Allowing Writ and Fixing Bond. Filed Dec. 16, 1919. C. R. McFall, Clerk. By Effie D. Botts, Chief Deputy Clerk. Cleon T. Knapp, Bisbee, Arizona. Boyle & Pickett, Douglas, Arizona, Attorneys for Defendant.

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, New Cornelia Copper Company, a corporation, as principal, and M. J. Cunningham and L. C. Shattuck, as sureties, are held and firmly bound unto Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, defendant in error, in the full sum of Eleven Thousand ($11,000.00) Dollars, the same being the [57] amount of the bond fixed by the District Court of the United States for the District of Arizona, by order duly entered on the records of said court on October 27th, 1919, to be paid to the said defendant in error, his legal representative, executor, administrator or successor, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of December, A. D. 1919.

WHEREAS on the 22d day of October, A. D. 1919, at the District Court of the United States, for the District of Arizona, in a suit pending in said Court between Ignacio S. Espinoza, as Administrator of the estate of Jose Maria Ochoa, deceased, plaintiff, and New Cornelia Copper Company, defendant, a judgment was rendered in favor of plaintiff and against the said defendant for the sum of Ten Thousand ($10,000.00) Dollars, together with the sum of Sixty-four and 40/100 ($64.40) Dollars, costs of action, and the said defendant has obtained a writ of error to reverse said judgment in the afore-

said action and filed a copy thereof in the clerk's office of said court and a citation directed to the said Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, State of California;

NOW THEREFORE, the condition of the obligation is such that if the said New Cornelia Copper Company shall prosecute said writ of error to effect, and answer all judgments and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

NEW CORNELIA COPPER COMPANY,
By ARTHUR W. ENGELDER.
W. J. CUNNINGHAM,
L. C. SHATTUCK. [58]

State of Arizona,
County of Cochise,—ss.

On the 10th day of December, 1919, personally appeared before me M. J. Cunningham and L. C. Shattuck, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein stated.

And the said M. J. Cunningham and L. C. Shattuck, being by me duly sworn says, each for himself and not one for the other, that he is a resident and

householder of the said county of Cochise, and that he is worth the sum of Eleven thousand ($11,000.00) Dollars over and above his just debts and legal liabilities and property exempt from execution.

W. J. CUNNINGHAM.
L. C. SHATTUCK.

Subscribed and sworn to before me this 10th day of December, A. D. 1919.

[Seal] CHARLES R. WOODS,
Notary Public, Cochise County, Arizona.

My commission expires May 23d, 1921.

The within bond is approved both as to sufficiency and form, this 16th day of December, 1919.

C. R. McFALL,
Clerk.

Service of a copy of the within bond is hereby admitted this 15th day of December, A. D. 1919, and the said bond is hereby approved.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 215 — Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Bond. Filed Dec. 16, 1919. C. R. McFall, Clerk. Cleon T. Knapp, Bisbee, Arizona, Boyle and Pickett, Douglas ,Arizona, Attorneys for Defendant. [59]

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for the District of Arizona.

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll.
Notice of motion requiring plaintiff to elect.
Motion requiring plaintiff to elect.
Order that plaintiff elects under Employers' Liability Law.
Transcript of all minute entries.
Motion for new trial.
Bill of exceptions.
Acknowledgment of service of bill of exceptions.
Order allowing bill of exceptions.

Petition for writ of error.
Assignment of errors.
Order allowing writ of error and fixing bond.
Bond on writ of error.
Writ of error.
Citation.
Praecipe for transcript.

Plaintiff's Exhibit 1. (Letters of Administration).

—and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court and the rules of United States Circuit Court of Appeals for the Ninth Circuit.

CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Defendant.

Service of a copy of the within praecipe for Transcript of record is [60] hereby admitted this 15th day of December, A. D. 1919.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsements]: No. 215 — Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Praecipe for Transcript of Record. Filed Dec. 16, 1919. C. R. McFall, Clerk. Cleon T.

Knapp, Bisbee, Arizona, Boyle & Pickett, Douglas, Arizona, Attorneys for Defendant.

Plaintiff's Exhibit No. 1—Letters of Administration.

In the Superior Court of Maricopa County, State of Arizona.

In the Matter of the Estate of JOSE MARIA OCHOA, Deceased.

State of Arizona,
County of Maricopa.—ss.

In accordance with an order made by the Superior Court on the 20th day of January, A. D. 1919, Ignacio S. Espinoza is hereby appointed Administrator of the Estate of Jose Maria Ochoa, Deceased.

Witness Claude S. Berryman, Clerk of the Superior Court of Maricopa County, State of Arizona, with the seal of said court affixed, this 24th day of January, A. D. 1919.

[Court Seal]

CLAUDE S. BERRYMAN,
Clerk.
By W. H. Linville,
Deputy Clerk.

State of Arizona,
County of Maricopa,—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution and Laws of the State of Arizona, and that I will faithfully perform, according to law, the duties of

Administrator of the Estate of Jose Maria Ochoa, Deceased.

IGNACIO S. ESPINOZA.

Subscribed and sworn to before me this 24th day of January, A. D. 1919.

[Notarial Seal]

JOSEPH S. JENCKES, [61]
Notary Public.

My commission expires Feb. 16, 1920.

[Endorsed]: No. 2971. Filed Jan. 24, 1919. Claude S. Berryman, Clerk. By Geo. F. Macdonald, Deputy.

State of Arizona,
County of Maricopa,—ss.

I, Claude S. Berryman, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the within and foregoing to be a full, true and correct copy of Letters of Administration issued in the therein entitled matter, as the same remains of record and on file in the office of said clerk; I further certify that said letters have not been revoked.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 20th day of October, A. D. 1919.

[Seal] CLAUDE S. BERRYMAN,
Clerk.

[Endorsements]: Certified Copy of No. 2971. Recorded Book 8, pages 85–86. In the Superior Court of Maricopa County, State of Arizona. In the Matter of the Estate of Jose Maria Ochoa, Deceased. Letters of Administration.

[Endorsements]: No. 215. Espinosa vs. Corn. Cop. Co., Ptf. Exhibit No. 1. Admitted and Filed Oct. 22/19. Mose Drachman, Clerk. [62]

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, deceased, plaintiff, and New Cornelia Copper Company, a corporation, defendant, a manifest error has happened, to the great damage of the said New Cornelia Copper Company, defendant, as by its complaint and assignment af errors appears, we being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ in said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done. [63]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of December, A. D. 1919, and of the Independence of the United States the one hundred and forty-third.

[Seal] C. R. McFALL,
Clerk.

Allowed on December 16th, 1919.

WM. H. SAWTELLE,
United States District Judge. [64]

Service of a copy of the within Writ of Error is hereby admitted this 15th day of December, A. D. 1919.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff.

[Endorsed]: No. 215—Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate

of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Writ of Error. [65]

In the United States District Court for the District of Arizona.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,
Plaintiff,

vs.

NEW CORNELIA COPPER COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

The President of the United States to Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, and to Messrs. Kibbey, Bennett & Jenckes, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein New Cornelia Copper Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be

corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 16th day of December, A. D. 1919, and of the Independence of the United States the one hundred and forty-third.

WM. H. SAWTELLE,
United States District Judge, for the District of Arizona. [66]

Service of a copy of the within Citation is hereby admitted this 15th day of December, A. D. 1919, by the undersigned in their own behalf and in behalf of the plaintiff herein, and further service of Citation after issuance is hereby expressly waived.

KIBBEY, BENNETT & JENCKES,
Attorneys for Plaintiff. [67]

[Endorsed]: No. 215—Tucson. In the United States District Court for the District of Arizona. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant. Citation on Writ of Error. Filed Dec. 16, 1919.

In the District Court of the United States for the District of Arizona.

Docket No. 215—TUCSON.

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, deceased, Plaintiff, vs. New Cornelia Copper Company, a Corporation, Defendant, said case being No. 215–Tucson, on the docket of said court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in

my office as such clerk in the city of Tucson, State and District aforesaid.

I further certify that the original writ of error and citation on writ of error are incorporated in said transcript of record. [68]

I further certify that the cost of preparing and certifying to said record amounts to the sum of Nineteen and 85/100 ($19.85) Dollars, and that same has been paid in full by the plaintiff in error, New Cornelia Copper Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this 7th day of January, in the year of our Lord, one thousand nine hundred and twenty, and of the Independence of the United States of America, the one hundred and forty-fourth.

[Seal] C. R. McFALL,
Clerk United States District Court, District of Arizona. [69]

[Endorsed]: No. 3437. United States Circuit Court of Appeals for the Ninth Circuit. New Cornelia Copper Company, a Corporation, Plaintiff in Error, vs. Ignacio S. Espinoza, as Administrator of the Estate of Jose Maria Ochoa, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed January 9, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3437

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOSA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona.

MR. CLEON T. KNAPP, of Bisbee, Arizona,
MESSRS. BOYLE & PICKETT, of Douglas, Ariz.
Attorneys for Plaintiff in Error.

Filed this 1920

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Clerk U. S. District Court of Appeals,
Ninth Circuit.

Service of two copies of within Brief of Plaintiff in Error is hereby acknowledged this.....
..... 1920.

.....

Attorneys for Defendant in Error.

No. 3437

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOSA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona.

MR. CLEON T. KNAPP, of Bisbee, Arizona,
MESSRS. BOYLE & PICKETT, of Douglas, Ariz.
Attorneys for Plaintiff in Error.

Filed this 1920

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Clerk U. S. District Court of Appeals,
Ninth Circuit.

Service of two copies of within Brief of Plaintiff in Error is hereby acknowledged this..... ..... 1920.

.....

Attorneys for Defendant in Error.

No. 3437

United States Circuit Court of Appeals

For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOSA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Plaintiff in Error

STATEMENT OF CASE.

Defendant in Error, as administrator of the estate of Jose Maria Ochoa, deceased, instituted this action in the Superior Court of Pima County, Arizona, against Plaintiff in Error, to recover for the death of the deceased. Plaintiff in Error, in the usual course, removed the cause to the United States District Court for the District of Arizona, at Tucson.

The complaint set up two separate causes of action for this death of said deceased. The first of such causes of action so pleaded, being that certain action provided by and existing under the provisions of Chapter Six, of Title Fourteen, Revised Statutes of Arizona, 1913, known as "THE EM-

PLOYERS' LIABILITY LAW OF ARIZONA" and the second of such causes of action so pleaded, being the usual and ordinary action existing in the absence of a particular statutory action therefor. for wrongful death due to negligence of the defendant.

Whereupon, on this state of the complaint, plaintiff in error moved that defendant in error be required to elect between the two said causes of action thus pleaded in the complaint (transcript p. 22) and upon hearing thereon, the Court granted said motion and defendant in error thereupon elected to proceed upon the said first cause of action pleaded in his complaint, being that existing and provided under the said provisions of said The Employers' Liability Law of Arizona (transcript p. 27).

The cause was tried to a jury (transcript p. 30) and at the close of the defendant in error's case, plaintiff in error moved the Court to direct the jury to return its verdict in favor of plaintiff in error, which motion was by the Court denied, to which ruling plaintiff in error duly excepted and the exception was allowed (transcript pp. 42, 43, 44, 45.) Plaintiff in error thereupon introduced its evidence and rested and at the close of all the evidence taken in the cause, again moved the Court to direct the jury to return its verdict in favor of plaintiff in error, which motion was by the Court denied, to which ruling exception was duly taken and allowed (transcript pp. 50, 52, 53).

The jury returned a verdict for defendant in

error in the sum of $10,000.00, (transcript p. 31), whereupon plaintiff in error moved that the verdict be set aside, which motion was by the Court denied and an exception to such ruling was duly taken and allowed. Plaintiff in Error thereupon moved for judgment notwithstanding the verdict, which motion was by the Court denied and an exception to such ruling duly taken and allowed. (Transcript p. 68.)

Judgment was duly entered upon motion therefor, that defendant in error recover said sum of $10,000.00 and his costs, whereupon plaintiff in error moved for a new trial, which motion by the Court was denied (transcript p. 68) and an exception to such ruling duly taken and allowed.

Thereupon, in due course, plaintiff in error proceeded to bring this cause up for review upon Writ of Error.

Specifications of Error

I.

The Court erred in denying motion made by plaintiff in error, when defendant in error had rested, (transcript pp. 42, 43, 44, 45) to direct the jury to return its verdict in favor of plaintiff in error, for the reasons that:

(a) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, arose out of, and in the course of, and was due to a condition or conditions of the occu-

pation, employment, work or service in which the deceased was engaged;

(b) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, was due to or occasioned by a risk or danger inherent or peculiar in or to the said occupation, employment, work or service in which the deceased was engaged;

(c) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased was not caused by the negligence of the deceased.

II.

The Court erred in denying motion made by plaintiff in error, when both defendant in error and plaintiff in error had rested, (transcript p. 50) to direct the jury to return its verdict in favor of plaintiff in error, for the reasons that:

(a) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, arose out of, and in the course of, and was due to a condition or conditions of the occupation, employment, work or service in which the deceased was engaged;

(b) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, was due to or occasioned by a risk or danger inherent or peculiar to or in said occupation, employment, work or service to or in which the deceased was engaged;

(c) Defendant in error had wholly failed to show that the deceased was at work or engaged in his said occupation, or his said employment, work or service, at the time when the said accident occurred to or was sustained by him, which accident resulted in his death;

(d) Defendant in error had wholly failed to show that the said accident which resulted in the death of the deceased, was not caused by the negligence of the deceased;

(e) Defendant in error had wholly failed to show any pecuniary loss or damage whatever;

(f) There was no question of fact presented for the jury to determine.

III.

The Court erred in denying motion made by plaintiff in error, when both defendant in error and plaintiff in error had rested, and after the Court had permitted defendant in error to re-open his case, over objection of plaintiff in error, to introduce testimony as to the life expectancy of the deceased, and the wages earned by deceased at the time of the accident, to direct the jury to return its verdict in favor of plaintiff in error, (transcript pp. 50, 51, 52, 53) for all and singular, the reasons assigned and set out in foregoing Specification of Error II, being matters and things designated therein a, b, c, d, e, and f.

IV.

The Court erred in permitting defendant in er-

ror, over the objection of plaintiff in error, to reopen his case, after both defendant in error and plaintiff in error had rested, and after plaintiff in error had moved the Court to direct the jury to return its verdict in favor of plaintiff in error, for the purpose of introducing testimony as to the life expectancy of the deceased, and as to the wages earned by deceased at the time of the accident. (Transcript pp. 50, 51, 52).

V.

The Court erred in instructing the jury as follows, to-wit:

> "You are further instructed that if you find from the evidence in this case that the plaintiff's intestate, Ochoa, at the time of his death, had gone upon the defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him time to go to work in the mine, and was gaged in a hazardous occupation under the Employers' Liability Law, and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work." (Transcript p. 57).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed (transcript pp. 66, 67).

VI.

The Court erred in instructing the jury as follows, to-wit:

> "It is my opinion that an employee, reg-

> ularly employed in a mine, who a few minutes, say four or five minutes, before the time for entering upon his work, enters upon the property of his employer at a point in close proximity to where he was to work and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardrous occupation within the meaning of the Employers' Liability Law" (transcript pp 57, 58).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript pp. 66, 67).

VII

The Court erred in instructing the jury as follows:, to-wit:

> "I further charge you, as I have previously done, that in my opinion under all the facts and circumstances of this case, that the plaintiff was doing work, service and employment for the defendant company at the time this accident occurred. That is my conclusion from all the facts detailed in this case." (Transcript p. 58).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript pp. 66, 67).

VIII.

The Court erred, when, after instructing the jury as follows, to-wit: (transcript pp. 56, 57)

> "Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, such injury must have occurred while he was at work in

his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Therefore, if you find that at the time Ochoa received the injury which caused his death, he was not at work in his occupation for the defendant, or if you find that such injury was not occasioned by a risk or danger inherent to such occupation, your verdict must be for the defendant."

AND (transcript p. 57)

"Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, it must have been due to a condition or conditions of the occupation, and an injury cannot be said to have been due to a condition or conditions of the occupation unless the employee at the time of the injury was rendering work, service or labor for his employer. Therefore, if you find that at the time he received the injury which caused his death, the plaintiff's intestate, Ochoa, was not rendering work, service or labor for defendant, your verdict must be for the defendant."

It qualified the same by stating and further instructing the jury as follows, to-wit: (transcript p. 58)

"So that when I gave you those two charges, which are to the effect that if you find at the time that Ochoa received the injury which caused his death, he was not rendering work, service or labor for the de-defendant, your verdict should be for the defendant, it is with the qualifications which I have just stated."

The qualifications being that if Ochoa—

"Had gone upon the defendant's property eight or ten minutes before the time to go to

work in the mine and was waiting there for the time to come for him to go to work, then the said Ochoa was engaged in a hazardrous occupation under the Employers' Liability Law and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work." (Transcript p. 57).

AND

"It is my opinion that an employee regularly employed in a mine, who a few minutes, say four or five minutes, before the time for his entering upon his work, entered upon the property of his employer at a point in close proximity to where he was to work, and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardrous occupation within the meaning of the Employers' Liability Law." (Transcript pp. 57, 58).

To which qualifying of its instructions so given by the Court and said instructions so given and qualified, plaintiff in error duly excepted, which exceptions were duly allowed. (Transcript pp. 65, 66, 67).

IX.

The Court erred in instructing the jury as follows, to-wit:

"Such damages should be computed or estimated by the probable accumulations of a man of the deceased's age, habits of life during his probable lifetime———— You are limited to ascertaining from the evidence in this case, and from the evidence alone, the actual pecuniary loss sustained in

> dollars and cents as near as you can approximate the same and in that amount only can you return a verdict for the plaintiff." (Transcript pp. 61, 62).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 67).

X.

The Court erred in instructing the jury as follows, to-wit:

> "In this case the testimony shows that the deceased left surviving him a widow and three or four minor children dependent upon him, and the Employers' Liability Act just quoted provides that the recovery, if any, shall be for the benefit of the widow and minor children." (Transcript p. 61).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 67).

XI.

The Court erred in refusing to give the following instruction to the jury, requested by plaintiff in error, to-wit: (transcript p. 66)

> "If you find that the intestate Ochoa in lighting a fire, which fact is uncontradicted, was doing an act outside the duties of his work, service and employment, you must find for the defendant company."

To which refusal of the Court, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 66).

XII.

The Court erred in refusing to give the following instruction to the jury, requested by plaintiff in error, to-wit: (transcript p. 66)

> "You are instructed that there is no evidence in this case that the powder or dynamite which caused the death of the intestate Ochoa, was ever owned or under the control of the defendant company."

To which refusal of the Court, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 66).

XIII.

The verdict and the judgment are each and both contrary to law and not sustained or justified by the evidence, by reason of the matters and things all and singular, set forth in foregoing Specifications of Error I-XIII both inclusive.

XIV.

The Court erred in denying the motion of plaintiff in error to set aside the verdict (transcript p. 68) for the reason that the verdict is contrary to the law and not sustained or justified by the evidence by reason of the said matters and things all and singular, set forth in said foregoing Specifications of Error I-XIII both inclusive.

XV.

The Court erred in denying the motion of plaintiff in error for judgment notwithstanding the verdict for the reason that said verdict is contrary to

the law and not sustained or justified by the evidence, by reason of the said matters and things all and singular, set forth in said foregoing Specifications of Error I-XIII both inclusive. (transcript p. 68).

XVI.

The Court erred in denying the motion of plaintiff in error for a new trial (transcript p. 68) by reason of said matters and things set forth in said Specifications of Error I-XV both inclusive, all and singular, and contained in said motion for new trial.

ARGUMENT

Specifications of Error I and II

MAY IT PLEASE THE COURT:

These two Specifications of Error may be best presented in conjunction, since the questions in both of them contained were brought before the trial Court for solution upon motions made by plaintiff in error for an instructed verdict at the two stages of the trial when such motions became in order, to-wit: When defendant in error had rested his case, and when both defendant in error and plaintiff in error had rested at the close of the evidence adduced at the trial.

These motions for an instructed verdict were based upon the matters and things contained in said Specifications of Error I and II, and in plaintiff in error's Assignments of Error (transcript pp. 73-81) and present for solution the following propositions, to-wit:

First Proposition

The Court erred in denying motions of plaintiff in error for an instructed verdict, for the reasons that defendant in error wholly failed to show that the accident which resulted in the death of the decedent, arose out of and in the course of, and was due to a condition or conditions of the occupation, employment, work or service in which said decedent was then and there engaged; or that such accident was due to or occasioned by any risk or danger inherent in or peculiar to such employment, occupation, work or service; or that said deceased was at work or engaged in his said employment, occupation, work or service at the time when such accident occurred or was by him sustained. (Specification of Error I, a, b; Specification of Error II, a, b, c.)

As we have pointed out in stating our case, this action was prosecuted under and defendant in error sought his remedy under "THE EMPLOYERS' LIABILITY LAW" of Arizona, (transcript p. 27) being Chapter Six, Title Fourteen, Revised Statutes Arizona, 1913 (Appendix to this Brief), enacted pursuant to Constitutional mandate contained in Sections 4, 5, 6, 7 and 8 of Article XVIII, of the Constitution of the State of Arizona (Appendix to this Brief).

There is no question of any conflict of any evidence adduced at the trial of this cause to establish the facts which at such trial were established. We are left to deal with these certain facts as they

were established by the evidence adduced by the defendant in error and the evidence adduced by the plaintiff in error, all of it in accord and not in conflict, and from these facts so established, ascertain the legal consequences therefrom and determine the legal result thereof.

All of this evidence is embodied in plaintiff in error's Bill of Exceptions (transcript pp. 38-53), and from it all it is established that the deceased came to his death from the following accident, sustained under the following circumstances, to-wit:

For a month and a few days prior to November 27, 1918, the deceased, Jose Maria Ochoa, was in the employ of plaintiff in error, New Cornelia Copper Company, at its mines at Ajo, Arizona, in the capacity of and in the occupation of a "driller" (transcript pp. 39, 45). On that date he left his place of residence to enter upon the performance of his duties at his place of work, at six thirty o'clock in the morning (transcript p. 40).

The time for the beginning of work by the deceased, in his said occupation as a "driller" was the hour of seven o'clock in the morning (transcript p. 41) and the place at which he was so engaged in his said occupation, was a quarry pit upon the premises of plaintiff in error, which was being excavated by the process of drilling, blasting and mining, and had in such process reached a depth varying from thirty to seventy-five feet (transcript pp. 40-41, 45-46) and it was the duty of de-

ceased, therein, to run a jackhammer and blast the rock formation in the usual process of mining.

Some time before the hour of seven o'clock in the morning, at which time the work of deceased in his said occupation, in his said capacity of "driller" was to begin, the deceased reached said premises of plaintiff in error, in the vicinity of the said quarry pit or excavation, (transcript pp. 50, 46, 40-41) and was there waiting for said hour of seven o'clock to arrive, at which time he was to enter upon the performance of his said duties (transcript pp. 40, 41, 50). This point where the deceased had so stationed himself was distant from the rim of the said quarry pit from thirty to forty feet (transcript pp. 40, 45-46) and from the place of work therein, of the deceased, about two hundred feet (transcript p. 46).

And at this point where deceased had so stationed himself, at the distance stated from his said place of work, for what purpose we know not, but of his own initiative and volition, and alone, deceased had built a fire, and there, at this fire was standing (transcript pp. 40-41) when the accident occurred which resulted in his death.

The evidence, without any conflict whatever, shows that the deceased had STEPPED ASIDE from the path or road leading to his place of work, in order to and for the purpose of lighting this fire. The eye witness Delgado says that deceased had built the fire about thirty-five or forty feet

to one side of the quarry hole, and ten or fifteen feet from the side of the road leading to the entrance to the quarry pit (transcript pp. 40, 42). The witness McHenry stated that the entrance where deceased would enter the quarry pit was about thirty feet away from the fire (transcript p. 48).

It is established by the evidence without any conflict whatever, that not only was it not customary for workmen to ever build fires upon the premises of plaintiff in error to warm themselves or for any other purpose, but that the building of fires by workmen for any purpose whatever upon the said premises was strictly by rule forbidden, and well known to be a prohibited act or practice. Specific instructions against such acts or conduct were existent and within the knowledge of employees generally. The witness Delgado stated that it was not customary for workmen to build fires to warm themselves before beginning work in the morning (transcript p. 41). The witness McHenry testified that it was not the duty of deceased to build fires to warm himself or for any other purpose, and that it was specifically requested of the workmen that they never light fires to warm themselves on the premises (transcript pp. 45, 47). The witness Brady testified that workmen were prohibited from building or lighting fires for the very obvious reason that lumber was kept piled within the premises of plaintiff in error (transcript p. 49) and that the instructions were not to allow fires anywhere around the works.

Immediately before the accident, deceased called to the eye witness Juan Delgado, a fellow driller in the quarry pit, saying:

"Come over near the fire; it is fifteen minutes yet to go to our work" (transcript p. 50).

This Juan Delgado, then proceeded to join deceased at the fire, in company with eight or ten other fellow workmen (transcript p. 40), and there they were all stationed when the accident occurred. The deceased had alone and unattended, built this fire (transcript p. 40) and thereafter, at his invitation, witness Delgado and the other fellow workmen had joined him (transcript pp. 50, 41, 42).

While this company of workmen were standing before this fire, so built by deceased, and at between ten and seven minutes before seven o'clock (transcript pp. 46, 41) and therefore, between ten minutes and seven minutes before the time had arrived for deceased, witness Delgado and other fellow workmen to enter upon the performance of their duties in the said quarry pit, and before any of them had actually begun to work, an explosion of powder, dynamite, or other explosive substance occurred (pp. 41, 45-46), which explosive substance was beneath the pieces or fragments of wood with which deceased had built his fire (transcript p. 41), which explosion took effect upon the person of deceased, and caused his immediate death.

What this explosive substance was, whether powder, dynamite or some other explosive sub-

stance, we do not know (transcript pp. 41, 43, 48). Plaintiff in error company used "gunpowder," "dynamite" and "other explosives" (transcript p. 41). The witnesses alternately called it "powder" and "dynamite" (transcript pp. 41, 42, 43, 48). Witness Delgado says the deceased never saw the explosive substance from which the explosion came that worked fatality to him, for the reason that it was CONCEALED under the wood which deceased had ignited and thus converted into a blazing fire, whereby the explosion came (transcript p. 41). Certainly, the explosive substance being thus CONCEALED, the witness Delgado never saw it, for had he discovered it or seen it prior to its explosion, he would have given some warning to his fellows, and to deceased. No one ever saw it, and no one knows what it was, whether gunpowder, dynamite, or some other explosive substance.

And, in like manner, no one knows how this explosive substance, whatever it was, came to be CONCEALED at this particular point upon the surface of the ground, away and distant from the work places of the employees, and from any place at which plaintiff in error company kept its explosives. It is established by the evidence (transcript pp. 41, 47, 48) that no explosive substance would ever be placed at the point where deceased met his death, to be used in the work of the mine.

The whole of the evidence is uncontradicted that never, in the history of the operation of plaintiff in error company, had explosive substance of any

nature been known to exist on top of the ground, or upon the surface of the premises (transcript pp 41, 43, 44, 46, 47, 48, 49). There had never been a surface explosion, nor had any explosive substance been encountered save in the actual handling of the same in the process of drilling and blasting, WHILE THE WORKMEN WERE ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING.

A strict and uniform course of keeping and handling explosive substances existed and was in force by practice, rule and regulation, enforced and observed by all, and well known to all, at the premises and property of plaintiff in error company during all the time that deceased was in the employ of the plaintiff in error, and at all times theretofore and thereafter (transcript pp. 41, 43, 44, 46, 47, 48, 49).

The established practice and course, so existing by rule and regulation was the following, to-wit: All explosive substances were kept in a powder house, about three hundred feet from the place of accident, with a man in charge thereof, (transcript pp. 41, 46, 47, 48, 49) and any such explosives could only be obtained for use in the course of operation, by presenting an order, for the exact amount thereof, to be then and there used, to the keeper in charge of the powder house (transcript pp. 41, 46, 47, 48, 49). This order was an order from a "boss" or superior of the workmen, upon the keeper of the powder house, to deliver to any particular or in-

dividual workman, for present use, then and there, a certain and exact amount of such explosive substance, which was designed to be and was the exact amount of such needed for present use.

Upon delivery of any such quantity of explosive substance to any workman or workmen, pursuant to any such order, the said exact amount of such is duly recorded, with the number of the workman to whom the same is delivered, and if all said quantity of such explosive substance is not then and there used up in the purpose for which such order was given for it, the rule is and was uniform that any such quantity of such explosive substance should be then and there returned to the powder house (transcript pp. 43, 46, 48, 49) and the witness Delgado never knew of an instance in the course of his employment, that any unused quantity of explosive substance had not been in accordance with such rule, returned by the workman to the powder house. No witness at the trial knew of a single instance where any such unused portion of the explosive substance had not been so returned to the powder house (transcript pp. 43, 47, 49) and therefore, from the evidence, as far as we can ascertain the facts to be, there had never been such an instance of failure to return the unused portion of such explosive substance. As we have seen, there had never been a surface explosion prior to the accident in question, nor had there ever been known to be or exist any explosive substance whatever upon the surface of the premises or property of

plaintiff in error company, or anywhere else, save in the powder house, and in the possession of workmen, ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING, and then, only that quantity of such explosive substance, then and there necessary to be used in such work, withdrawn regularly for such purpose under the rules and regulations aforesaid, and if any unused portion thereof remained, the same was INVARIABLY returned to the powder house and its keeper.

Such was the accident which resulted in fatality to deceased, according to the whole of the evidence adduced at the trial, which evidence is wholly without any conflict whatever between the testimony on behalf of defendant in error and that on behalf of plaintiff in error, as to any of the foregoing facts set out.

After the occurrence of said accident, the time having arrived for entering upon the performance of their duties, the fellow workmen of deceased, present at the accident, including the witness Delgado, went to work (transcript p. 41), which would have been the time for deceased to enter upon the performance of his duties had he not sustained the said accident.

As heretofore called to the attention of the Court, defendant in error set out in the complaint for recovery for the death of deceased, resulting from the accident aforesaid, two distinct causes of action therefor, one being the certain cause of

dividual workman, for present use, then and there, a certain and exact amount of such explosive substance, which was designed to be and was the exact amount of such needed for present use.

Upon delivery of any such quantity of explosive substance to any workman or workmen, pursuant to any such order, the said exact amount of such is duly recorded, with the number of the workman to whom the same is delivered, and if all said quantity of such explosive substance is not then and there used up in the purpose for which such order was given for it, the rule is and was uniform that any such quantity of such explosive substance should be then and there returned to the powder house (transcript pp. 43, 46, 48, 49) and the witness Delgado never knew of an instance in the course of his employment, that any unused quantity of explosive substance had not been in accordance with such rule, returned by the workman to the powder house. No witness at the trial knew of a single instance where any such unused portion of the explosive substance had not been so returned to the powder house (transcript pp. 43, 47, 49) and therefore, from the evidence, as far as we can ascertain the facts to be, there had never been such an instance of failure to return the unused portion of such explosive substance. As we have seen, there had never been a surface explosion prior to the accident in question, nor had there ever been known to be or exist any explosive substance whatever upon the surface of the premises or property of

plaintiff in error company, or anywhere else, save in the powder house, and in the possession of workmen, ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING, and then, only that quantity of such explosive substance, then and there necessary to be used in such work, withdrawn regularly for such purpose under the rules and regulations aforesaid, and if any unused portion thereof remained, the same was INVARIABLY returned to the powder house and its keeper.

Such was the accident which resulted in fatality to deceased, according to the whole of the evidence adduced at the trial, which evidence is wholly without any conflict whatever between the testimony on behalf of defendant in error and that on behalf of plaintiff in error, as to any of the foregoing facts set out.

After the occurrence of said accident, the time having arrived for entering upon the performance of their duties, the fellow workmen of deceased, present at the accident, including the witness Delgado, went to work (transcript p. 41), which would have been the time for deceased to enter upon the performance of his duties had he not sustained the said accident.

As heretofore called to the attention of the Court, defendant in error set out in the complaint for recovery for the death of deceased, resulting from the accident aforesaid, two distinct causes of action therefor, one being the certain cause of

action existing under the provisions of Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "EMPLOYERS' LIABILITY LAW," being a statutory action, and the other being the usual and ordinary action existing generally in the absence of a particular statutory action, for wrongful death due to negligence of plaintiff in error.

Defendant in error elected to prosecute his action under the said "EMPLOYERS' LIABILITY LAW" and thereunder did so prosecute it.

It therefore becomes our enquiry in this cause to determine whether or not defendant in error brought himself within such "EMPLOYERS' LIABILITY LAW" and established a right to recover thereunder.

The "EMPLOYERS' LIABILITY LAW" of Arizona is contained in said Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, being Sections 3153-3162 thereof, which was enacted pursuant to Constitutional Mandate appearing in Article XVIII, of the Constitution of the State of Arizona, Sections 4, 5, 6, 7 and 8 thereof, all of which provisions are set out in the Appendix to this Brief, to all and singular of which, reference is hereby made and will be made throughout.

Examination of the provisions of such EMPLOYERS' LIABILITY LAW, and the provisions of the Constitutional Mandate preceeding it, discloses that in two particulars and in two respects, it is **sui generis**, and wholly anomalous with respect to and

in comparison with all other existent legislative enactments in the field of Workmen's Compensation and Employers' Liability legislation. In these two respects and particulars, it stands alone, has no counterpart, and is wholly foreign to all known such legislative enactments, in that:

The EMPLOYERS' LIABILITY LAW of Arizona, imposes upon an employer, in certain defined hazardous occupations, in all cases wherein the injury or death of an employee "Shall not have been caused by the negligence of the employee killed or injured," absolute, UNLIMITED liability for injuries or death sustained by employees therein engaged, at the will of the jury, but restricts recovery thereunder, to injuries or death sustained by such employees, due to "accident arising out of and in the course of such labor, services, and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT"—

> Constitution of Arizona, Article XVIII, Sec. 7, Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, Sections 3153, 3154, 3155, 3156, 3157, 3158, 3159 thereof.

(Appendix)

With the validity or constitutionality of the foregoing enactments, we need not be concerned in this enquiry, for such has been determined.

Inspiration Co. vs. Mendez, 19 Ariz. 151.

Superior & Pittsburgh C. Co. vs Tomich, 19 Ariz. 182.

Arizona Copper Co. vs Hammer, etc. 63 L Ed. 636.

We may not now challenge the right of a legislative body to leave the determination of liability both as to its existence and its quantum or assessment to ARBITRARINESS, and fix it absolute and without limit, upon an employer in hazardous occupations in the absence of any fault whatever upon the part of such employer, whatever violence be deemed to thus be worked to the established canons of jurisprudence as the same have heretofore always been held to exist. For this has been done, and received the highest of judicial sanction, and it is now established that thereby no constitutional right is violated or infringed.

Arizona Copper Company vs. Hammer, 63 L. Ed. 636.

Inspiration Copper Co. vs. Mendez, 19 Ariz. 151.

Superior & Pittsburgh C. Co. vs. Tomich, 19 Ariz. 182.

Whether we believe with Mr. Justice McKenna, Mr. Justice McReynolds, Mr. Justice Van Devanter and The Chief Justice of the Supreme Court of our land that—

> "Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruc-

tion of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the Courts to uphold the old one unless and until superseded through orderly methods."

and

"Here, without fault, the statute in question imposes liability is some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common law rules have been set aside without a reasonably just substitute; the employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery, which may ultimately go to non-dependents, distant relatives, or, by escheat to the state; 'the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations;' on the contrary, it will probably intensify the difficulties."

Arizona Copper Company vs. Hammer, 63 L. ed. 636 dissenting opinion of Mr. Justice McReynolds, pages 652, 653 thereof;

Or whether we agree with Mr. Justice Pitney, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Clarke and Mr. Justice Brandeis, that imposition of unlimited absolute liability in the absence of fault violates no constitutional right, as it is laid down in the majority opinion in the Hammer case, supra, it is for us settled that such legislation is invulner-

able and must stand, and we have no quarrel with the judicial determination of this question, as it stands adjudicated in said Hammer case, and the Mendez and Tomich cases from the Supreme Court of Arizona, already cited, in spite of the strong dissent expressed by Mr. Justice Ross.

BUT, MAY IT PLEASE THE COURT—When the Constitution making body of the State of Arizona, and the legislature of that State, in the field of industrial law making, saw fit to impose this absolute, UNLIMITED liability, in the absence of any fault whatever, upon the part of an employer in the hazardous occupations, and cast the employer before a jury stript of all defense, save the right to diminish recovery by showing contributory negligence, and the right to bar recovery by showing the injury or death to have been caused by the sole negligence of an employee.

Section 3159, Revised Statutes Arizona, 1913,

Calumet & Arizona M. Co. vs. Gardner, 187 Pac. 563, thus and thereby transcending and exceeding all the limits theretofore set up to legislative prerogative, and so going to lengths and attaining an extremity unknown to canons and principles of jurisprudence within or without industrial perspective, it likewise saw fit to RESTRICT in and by the express terms and verbiage of its said enactments, any such recovery to and for injuries and death resulting from

> "accident arising out of and in the course of such labor, services and employment, AND

DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT";

And, well may we say that the constitution making body, and the enacting legislature had it in mind, in imposing this peculiar statutory liability and burden, **sui generis,** to restrict and hold within certain limits and bounds then and there in its contemplation, such burden and liability, and restrict its application to certain injuries present in the defined hazardous occupations, and to none others. For both the constitution making body and the enacting legislature declare that this anomalous liability, without a counterpart, and **sui generis**, exists and is imposed for injury or death due to

> "Accident arising out of and in the course of such labor, services and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT"

Constitution of Arizona, Article XVIII, Sec. 7
Section 3158, Revised Statutes Arizona, 1913.

In the Workmen's Compensation Acts, generally, in Employers' Liability Laws, generally, and through the whole field of industrial legislation, we find the provisions—

> "Arising out of and in the course of the employment."
>
> "Arising out of or in the course of the employment."

In no existent provision of constitutional or leg-

islative enactment, known to jurisprudence, in or out of industrial legislation, save and except in the aforementioned Section 7 of Article XVIII of the Arizona Constitution, and in the aforementioned sections of the said EMPLOYERS' LIABILITY LAW of Arizona, is there found or has there ever been incorporated the further restrictive provision:

> "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

There, and there alone it exists, **sui generis** and without a counterpart in all the world.

No other enactment will or can be laid before this Court by defendant in error or any other litigant, with this provision in it, for there is no such. and as this Court proceeds to examine the authorities cited in this cause by the defendant in error, it must bear in mind, that in each and every case thus presented, the enactment in such case being construed or interpreted, is an enactment of the type form, there being slight variations encountered, in which the foregoing provision found in the Arizona enactments, "and due to a condition or conditions, etc," does not appear and in which the same never had existence, but invariably therein will be found the usual provisions, "arising out of and, or in the course of, etc."

The constitution making body and the enacting legislature of Arizona were not engaged in word badinage when they added to the usual said pro-

visions, in the CONJUNCTIVE, the further and restrictive language, "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT." Something was in mind and in contemplation. This was not a mere and vain word composition upon the part of the lawmakers, inserted for the speculations of enquiring minds, but, a legal purpose was in view, and a differentiation was accomplished, distinguishing and differentiating the enactment in a controversy from all other existent industrial legislative enactments.

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159.

It is conclusive that this purpose to so differentiate the enactment in controversy was in the minds of and in contemplation of the enacting legislature, for it contemporaneously produced and enacted a Workman's Compensation Act, at the same time, the same being:

> Chapter Seven, Title Fourteen, Revised Statutes Arizona, 1913, Sections 3163-3179 thereof,

and we would call the Court's attention to Sections 3164 and 3169 thereof (Appendix), wherein and whereby recovery exists thereunder, for injuries due to—

> "'Accident arising out of and in the course of such labor, service or employment"

obviously an enactment in such industrial legislation of the type form, already adverted to in this discussion, and we note that from such, and clearly,

designedly and purposely, the legislature OMITTED the said further restrictive provision,

> "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT,"

And thus, we see that the State of Arizona has the usual type form Compensation Act, and as we have seen, the State of Arizona has its further and additional EMPLOYERS' LIABILITY LAW, to which it superadded the said further foregoing restrictive provision.

We are in consequence, impelled to this conclusion reached, and we submit, that the minds of reasonable men can not legally differ as to it.

The Supreme Court of the State of Arizona reached the same conclusion, and apparently from the same legal considerations.

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159.

Not only would this conclusion result from these restrictive words themselves, if nothing else appeared, but we see that it was clearly in the minds of the legislators as they framed this EMPLOYERS' LIABILITY LAW, for in it they unequivocally say in Section 3155 thereof, Revised Statutes Arizona, 1913, that it contemplates recovery for injuries coming from and resulting from matters and things "INHERENT IN" the designated hazardous employments and which are "UNAVOIDABLE BY" the workmen in such occupations, and

therefore, recovery is not contemplated for every and all injury sustained by an employee in such occupations, particularly are those injuries not contemplated to be recovered for which are AVOIDABLE by the workmen, or are not due to and caused by matters and things NOT INHERENT in the particular occupation, but which could occur to workmen in other classes of occupations or employments, and so we have the above stated restrictive provision, added in the conjunctive, to-wit: "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

And such conclusion would almost of necessity have to follow, if we were left with but the express restrictive provision quoted to deal with, for the elementary canon of statutory construction, that an enactment in derogation of the common law must take a strict construction when its application is invoked, demands that this conclusion be reached. And as we have seen from the Hammer case, suppra, 63 L. Ed. 636, no enactment yet has gone to such extremity in derogation of the common law and its principles. The principle stated is of course elemental.

36 CYC, 1178, et seq. and authorities.

All of which, the Supreme Court of Arizona, in construing this EMPLOYERS' LIABILITY LAW, is well aware of, and naturally arrived at this same conclusion, as we see in its decision in—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159
The Court says: Pages 162-163:

> "The meaning of the phrase 'caused by an accident due to a condition or conditions of such occupation,' appearing in the Constitution (Section 7, Art. 18), and next in the Liability Act (Paragraph 3154), as descriptive of the kind of accident intended to give rise to a right of action to an injured employee, has not yet been construed by the Court. THE EXPRESSION IS ORIGINAL IN OUR CONSTITUTION AND LAWS. We have not been able to find it in any of the compensation or liability laws or in any decision of a Court, or in any text book, and it necessarily follows that it has not been defined or applied. It is evident that the accident must arise out and also be INHERENT in the occupation ITSELF; the condition or conditions that produce the accident must INHERE in the occupation. If the occupation is non-hazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employee therein are outside of the purview of the Constitution and likewise of the Liability Law. The legislature, in paragraph 3155, has defined the kind of accident intended by it to be covered by the Employers' Liability Act in the following language:
>
> > 'By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are INHERENT in such occupations and which are UNAVOIDABLE by the workmen therein.'

It would seem that before an employee may recover for injury under this act, it must have occurred WHILE HE WAS AT WORK IN HIS OCCUPATION, and it must have been occasioned by a risk or danger INHERENT in the occupation.

Our statute (paragraph 3158) requires SOMETHING MORE than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws; our statute being:

> 'When in the course of work in any of the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATIONS OR EMPLOYMENT.'

These added words to the common expression MUST MEAN SOMETHING. The words 'arising out of' have been construed to refer to the origin or cause of the injury, and the words 'in the course of' to refer to the time, place and circumstances under which it occurred. Workmen's Compensation Acts, p. 72, Corpus Juris. SUPERADDED to these under our Liability Act is the requirement that the injury must have occurred in the 'work,' 'labor,' 'service' and 'employment' and be 'DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION.' The act of appellee IN GOING AWAY FROM HIS WORK FOR REFRESHMENTS was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence HE WAS

NOT RENDERING WORK, SERVICE OR LABOR for appellant, AND THEREFORE THE INJURY HE SUSTAINED WHILE ON SUCH ERRAND WAS NOT DUE TO A CONDITION OR CONDITIONS OF HIS OCCUPATION. Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work itself and, because of said hazard, 'UNAVOIDABLE' on the part of the employee. Calumet & Arizona M. Co. vs. Chambers, 20 Ariz., 176 Pac. 839.

The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employees of appellant were exposed as much as those engaged in the service of appellant. Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In Re Nichol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A 306."

Now, if the present action was the usual action brought under the aforementioned type form Compensation or Liability Act, the right of defendant in error to even then recover, does not appear upon the evidence. Mere injury sustained while an employee is traveling to the place of work, or even after he has arrived upon the premises of the employer, or there, in the vicinity of the place of work does not establish the right to recover.

Honnold on Workmen's Compensation, Section 107-109,

Dawbarn, Employers' Liability and Workmen's Compensation, Fourth Edition, page 118.

Boyd on Workmen's Compensation, Section 186,

Harper on Workmen's Compensation, Section 34,

Bradbury on Workmen's Compensation, Vol. 1, page 404.

Hills vs. Blair, 148 N. W. 243.

Smith vs. L. & Y. Rly. 15 T. L. R. 64.

Reed vs. G. W. Rly. 99 L. T. 781.

Williams vs. Coal & Iron Co. 3 B. W. C. C. 65.

Hoskins vs. Lancaster, 3 B. W. C. C. 476.

When in such situation, such employees proceeds to divert his acts into a course or channel of conduct disconnected from his occupation or employment, and not incidental thereto nor incident to his presence there for the purpose of entering upon the performance of his duties in such occupation or employment, but on the contrary, to the accomplishment of some distinctively personal and individual purpose of his own, there being no association or connection between the act so being undertaken and accomplished for such personal or individual purpose and the occupation or employment and the incidents thereof, then, by the soundest of judicial decision, there can be no recovery, and injury or accident so encountered is held not to arise out of or in the course of such occupation or employment of the employee.

And when it appears that an employee so situated, to accomplish the personal or individual purpose, steps aside from the usual avenue of ingress or egress to and from his place of work, and proceeds to do or perform such act or acts in violation of rules and regulations or customs applicable to him as an employee, it is settled that there may be no recovery, and injury or accident by such employee sustained does not arise out of or in the course of the occupation or employment of such employee.

Byram vs. I. C. R. R., 154 N. W. 1006.
Moore vs. Iudustrial, etc., 172 Pac. 1114.
Hills vs. Blair, 148 N. W. 243.
Healy vs. Cockrill, 202 S. W. 229.
Eakin's Adm'r. vs. Anderson, 183 S. W. 217.
Borogad vs. Dix, 172 NYS 489.
Hill vs. Staats, 187 S. W. 1039.
Symington vs. Sikes, 88 Atl. 134.
Hardy vs. At. R. R., etc., 93 S. E. 18.
Hobbs vs. Gt. N. R. R., 142 Pac. 20.
C. N. O., etc. R. R. vs. Wilson, 171 S. W. 430.
Van Nostrand vs. N. P. R. R., 151 Pac. 89.
N. W. Pac. R. R. vs. Indus. Com., 163 Pac. 1000.
Ames vs. N. Y. C. R. R., 165 NYS 84.
In re Betts, 118 N. E. 551.
Murphy vs. Steel Co., 169 NYS 781.
Lumber Co. vs. Indus. Com., 167 N. W. 453.
Const. Co. vs. Indus. Com., 122 N. E. 113.
Spooner vs. Detroit Co., 153 N. W. 657.
De Voe vs. N. Y. St. R. R., 155 NYS 12.
Hopkins vs. Sugar Co., 150 N. W. 325.
Newman vs. Newman, 155 NYS 665.

Fumiciello's case, 107 N. E. 349.
Bischoff vs. Car Co., 157 N. W. 34.
Mann vs. Knitting Co., 96 Atl. 368.
Clark vs. Clark, 155 N. W. 507.

And, within the foregoing principles, and class of adjudications just enumerated, comes and properly belongs the case at bar.

For the evidence without conflict establishes, as we have heretofore seen, that the deceased at the time of the accident, was not engaged in any of the duties of his employment or occupation, but had arrived on the premises of the employer, in the vicinity of the quarry pit within which it was his duty to work as a driller, some time before the time had arrived for him to begin work (transcript pp. 50, 46, 40-41), when he STEPPED ASIDE from the path or road leading to the quarry pit, his place of work being within such quarry pit, and ten or fifteen feet OFF the path or road, thirty-five or forty feet distant from the rim of the quarry pit, and two hundred feet distant from the place of work of deceased within the quarry pit (transcript pp. 40, 42) and there alone, built a fire and at such fire was standing when the accident occurred (transcript pp. 40-41) which resulted in his death. The building of fires by workmen upon the premises not only was not customary, but the same was contrary to instructions given to the workmen (transcript pp 41, 45, 47, 49). Fifteen minutes before the time for deceased to enter upon the performance of his duties as a driller, he called to a fellow work-

man to join him at the fire (transcript p. 50) and between ten minutes and seven minutes before such time to go to work the accident occurred at the fire (transcript pp. 41, 45-46).

It is obvious that the conduct and acts of deceased were wholly foreign to any duty or duties of his occupation or employment, and to any of the incidents thereof. The same were not incident to his presence at the time and place, preparatory to going to work, but the same did uneqivocally constitute the going upon "a journey of his own" to accomplish a distinctively personal and individual purpose of his own, and if indeed he was cold in the early morning, nothing in or incident to his occupation or employment or any duties therein, called for him to build a fire upon the surface of the ground to warm himself. There was no association or connection between the acts of deceased in building this fire and his occupation or employment or any duty or duties thereof, but on the contrary, the same constituted a departure therefrom, and a breach thereof, contrary to custom observed by and instructions given to the workmen.

AND THIS IS SETTLED, which disposes of the question under discussion, that where, as is established by the uncontroverted evidence and the undisputed facts hereinbefore set up in the evidence, AT THE TIME OF THE INJURY, THE EMPLOYEE IS ENGAGED IN A VOLUNTARY ACT NOT ACCEPTED BY, OR KNOWN TO HIS EM-

PLOYER, AND OUTSIDE OF THE DUTIES FOR WHICH HE IS EMPLOYED, THE INJURY CANNOT BE SAID TO BE IN THE COURSE OF OR ARISING OUT OF THE EMPLOYMENT, AND HENCE, WHERE THE INJURY IS DUE TO THE ACT OF THE EMPLOYEE OUTSIDE OF HIS DUTIES, THOUGH FOR THE MUTUAL CONVENIENCE OF THE EMPLOYER AND THE EMPLOYEE (which does not appear in the evidence in this case), HE MUST SHOW THAT THE ACT WAS DONE WITH THE KNOWLEDGE AND ASSENT OF THE EMPLOYER.

Workmen's Compensation Acts, CORPUS JURIS, page 82.

Clark vs. Clark, 155 N. W. 507.

Spooner vs. Detroit Co., 143 N. W. 657.

De Voe vs. N. Y., etc., Ry., 155 NYS 12, 113 N. E. 256.

Lowe vs. Pearson, (1899) 1 Q. B. 261, 1 WCC 5.

Dougal vs. Westbrook, 6 B. W. C. C. 705.

Whiteman vs. Clifden, 6 B. W. C. C. 49.

Smith vs. Morrison, 5 B. W. C. C. 151.

McDaid vs. Steel, 4 B. W. C. C. 412 (1911) S. C. 859.

Kerr vs. Baird, 4 B. W. C. C. 397 (1911) S. C. 701.

Cronin vs. Silver, 4 B. W. C. C. 221.

Jenkinson vs. Harrison, 4 B. W. C. C. 194.

Weighill vs. Coal Co., 4 B. W. C. C. 141.

Whelan vs. Moore, 2 B. W. C. C. 114.

McAllan vs. Council, 8 F (ct. Sess.) 783.

McHenry vs. Ry., S. C. 732 (1907).

Edwards vs. Coal Co., 5 W. C. C. 21.
Losh vs. Evans, 5 W. C. C. 17, 19 T. L. R. 142.

The explosive substance from which came the accident was CONCEALED beneath the wood from which deceased built his fire (transcript p. 41). It is not even know what it was. Deceased did not encounter it at his place of work within the quarry pit, nor in the usual course of handling explosives in his occupation, but at a point OFF the path or road leading to his place of work, to which point he had journeyed to build his fire. Whatever this explosive substance was, no connection between it and plaintiff in error company is made in the evidence. Never before had any explosive been known to exist upon the surface of the premises, anywhere (transcript pp. 41, 43, 44, 46, 47, 48, 49), and in the operation of plaintiff in error company, no explosive would ever have been placed at the point where the fire was built. There had never been a surface explosion. All explosives were kept in a powder house at or in the workings of the mine, and could only be gotten upon an order for the specific amount to be presently used, and the unused portion thereof returned straightway to the keeper of the powder, and no one ever had knowledge of any instance where any such unused portion of explosive had not been so returned (transcript pp. 43, 46, 47, 49, 41, 44, 48).

We respectfully submit that under the foregoing undisputed facts, the authorities submitted and the principles therefrom existing, that there can

be no recovery and could be no recovery under any known Compensation or Liability Act of the foregoing mentioned type form and that upon any sound theory the accident in controversy can not be said to have arisen out of or in the course of the occupation or employment in which deceased was engaged, even though we omit from all consideration the EMPLOYERS' LIABILITY LAW OF ARIZONA, under which the present action is brought and which alone must determine our enquiry.

Now, we have seen that the enacting legislature SUPERADDED to the said EMPLOYERS' LIABILITY LAW, a further restrictive provision, **sui generis,** unknown to and not found in any existent industrial legislation, whether compensatory of liability in its nature, in the following terms:

"AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

The Supreme Court of Arizona in construing this enactment says in the determinative case of—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159, page 162:

> "Our statute (paragraph 3158) requires SOMETHING MORE than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws; our statute being:
>
> 'When in the course of work in any of

> the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT.'

These added words to the common expression MUST MEAN SOMETHING.

It is evident that the accident must arise out of and also be INHERENT in the occupation ITSELF; the condition or conditions that produce the accident must INHERE in the occupation.

It would seem that before an employee may recover for injury under this act, it must have occurred WHILE HE WAS AT WORK IN HIS OCCUPATION, and it must have been occasioned by a risk or danger INHERENT in the occupation.

The act of appellee IN GOING AWAY FROM HIS WORK FOR REFRESHMENTS was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence HE WAS NOT RENDERING WORK, SERVICE OR LABOR for appellant, AND THEREFORE THE INJURY HE SUSTAINED WHILE ON SUCH ERRAND WAS NOT DUE TO A CONDITION OR CONDITIONS OF HIS OCCUPATION.

Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work ITSELF and, because of said hazard, UNAVOIDABLE on the part of the employee.

> Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In Re Nichol, 102 N .E. 697."

From which it is clear that the condition or conditions which produce the accident, must be inherent in and inhere in the occupation itself in which the employee is engaged, and at the time such accident is sustained, such employee must therefore be actually at work in such occupation, and engaged in the performance of its duties. In the present case, the employee was not engaged in the performance of any duties in or incident to his occupation of a driller, but before the time to go to work, in the vicinity of the place of work, all of which we have seen in the evidence, he had STEPPED ASIDE from the road or path leading to the place of work, to accomplish the purely personal end and purpose of building a fire off the road side for his individual and personal comfort, some fifteen minutes before the time to go to work, contrary to custom, and instructions to workmen.

Obviously, nothing INHERENT in the occupation of driller necessitated the building of a fire at the time and place of the accident, however proper it might be for the deceased to have regard for his personal warmth and comfort. There is nothing to show that even had be gotten a little

chilled or cold, any danger or menace thereby threatened or confronted him, calling for him to leave the road or path to his place of work and build the fire.

Suppose the climatic condition had been reversed at the time and place of the accident, and instead of deceased encountering chill in the atmosphere, he had encountered heat instead, and that flowing through the premises there was a stream. That deceased STEPPED ASIDE from the road leading to the place of work, and OFF the road, at a like distance as the point where he built the fire, a short while before the time had arrived for him to go to work in the quarry pit, he undertook to cool himself in the stream, and owing to the current or depth of the waters, he sustained death by drowning. Would this accident be one INHERENT in his occupation as a driller in the quarry pit, and did anything therein necessitate or call for him going into the stream for the purpose of cooling himself? And would not the danger existent in the depth of the stream or in its current exist to all other persons upon or passing through the premises, both to employees of the plaintiff in error company, and to persons not such employees as well who might be upon the premises in any capacity, or who might have access to the stream, and so, even as to trespassers?

The danger existent in concealed explosive at the point of the accident, on the surface of the ground, to persons building fires over the same

was not a risk or danger inherent in the occupation of deceased as a driller, for like the "scale pit" in the aforementioned Mathews case, such a danger existed to and confronted all persons whomsoever, who upon the said premises at the time and place of the accident, might ignite flames, or who at this very point where the accident occurred, might kindle fires for their personal comfort. Such a danger confronted any traveler passing through the premises and building such a fire, or any trespasser so conducting himself, and did not exist as to the deceased and his fellow workmen and none others. This danger existed as to any clerical employee passing through the premises on his way to work, or who might arrive a few minutes before his office or place of work was open to him, and wander about the premises during such interval. It existed in like manner to any drayman hauling through the premises who might halt at any point therein. It did not exist merely as to drillers in the quarry pit, and was no more inherent in the drilling occupation than in the bookkeeping occupation. This would not, we respectfully submit, seem to be argueable.

In Re Nichol, 102 N. E. 697.

However, the Supreme Court of Arizona holds that without regard to the purpose actuating an employee in taking himself out of actual performance of the duties of the particular occupation, the fact that he is not so engaged in the performance of the same when accident is sustained, is de-

cisive of the question we are concerned with, for as the Court points out, that during the time of absence from such performance, and by reason of such very absence, such employee is not rendering work, service or labor in such occupation or employment, and that in consequence, such accident can not be DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION. It is in consequence a legal impossibility to be doing something other than an act or acts in actual performance of the duties of the particular occupation, and suffer or sustain an accident DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION, and we respectfully submit that the deceased has not been and can not be brought within the provisions of said EMPLOYERS' LIABILITY LAW.

Calumet & Arizona M. Co. vs. Chambers, 20 Ariz. 56, 176 Pac. 839.

Ross vs. Kay Copper Company, 20 Ariz. 576, 184 Pac. 978.

And still another element, which under the said Mathews case, must concur with all and singular the elements aforementioned, or else the employee seeking to recover under the said EMPLOYERS' LIABILITY LAW must fail, is wholly lacking.

A hazard or danger in the work itself, UNAVOIDABLE upon the part of the employee, must have caused the accident in question. In the present case, the accident in question was not caused

by any hazard or danger whatever IN THE WORK ITSELF, for the deceased was not at work when he sustained the accident. He had not gone to work, but fifteen minutes at least, before the time for him to go to work, he had left the road leading to work, and off the road, distant from the place of work, he had alone, built a fire for his own purposes, and at this fire he was standing. This was not a situation UNAVOIDABLE BY HIM. He could have avoided it by continuing on the road to work, and arriving at the place of work, and if cold there, within the quarry pit, he might have sought shelter, or otherwise accomplished his personal comfort. He could also have avoided building a fire off the road side and avoided igniting a flame there. Any employee, driller or otherwise could have avoided such. This was nothing that was unavoidable by any employee or workman. In fact, it was prohibited by instructions to workmen and unknown to custom, all of which we have seen, and could have been and should have been avoided by all employees.

Such is the result coming from the said EMPLOYERS' LIABILITY LAW, its construction by the Supreme Court of Arizona, particularly with respect to its superadded restrictive provision now fully discussed and **sui generis**, and the whole of the evidence, unconflicting, establishing the undisputed facts hereinbefore laid before the Court. It is a necessary result, which could not, we earnestly and respectfully submit, be otherwise. The de-

ceased can not be and has not been brought within the purview or within the provisions of said EMPLOYERS' LIABILITY LAW, and the accident in question can not be said to have been DUE TO A CONDITION OR CONDITIONS OF THE OCCUPATION OR EMPLOYMENT of deceased.

And it follows, that the trial Court should have granted both said Motions for an instructed verdict made by plaintiff in error as and when the same were made.

The gravity of the situation in which defendant in error stood was well appreciated by the trial Court who said (transcript pp. 42, 43, 44):

> "Whether or not this accident was due to a condition of his employment is not very clear to me."
>
> "The testimony shows that it was not customary for the company to leave dynamite and powder, which was in use around the place where the employees congregated to wait the time to go to work—for the time when they were required to go to work. If the testimony showed that, it might be said that that was one of the conditions of the employment, or the situation surrounding it and might be such as to come within that definition, but I am somewhat in doubt as to whether the mere fact that that dynamite was placed there by some one, we don't know by whom, was one of the conditions of the employment, I will allow you to recall this witness or any other witness that may be present to the stand to enquire into that question".
>
> "I think I will overrule the motion. That

> is not a question for this Court to pass upon, I think, as requested by counsel. I think that I would do the plaintiff an injustice and I think I shall resolve the doubt in favor of the plaintiff."

Whereupon, to allow defendant in error to attempt to produce further testimony for the purpose of removing this doubt expressed by the Court, the witness Delgado was again called to the stand in the absence of the jury, and further effort was made, which effort elicited NOTHING FURTHER in this direction, and so, without anything further being elicited, the Court proceeded to nevertheless, resolve the doubt in favor of defendant in error (transcript pp. 43, 44, 45).

Yet, fearing to do an injustice to the plaintiff, upon the state of the evidence now before this Court, the Motions of plaintiff in error for an instructed verdict were denied.

We respectfully submit, that the error is patent, and earnestly say to the Court that the Motions for an instructed verdict properly should have been granted.

The foregoing errors occur throughout the instructions of the trial Court, as we will note when we reach that portion of the argument.

Specification of Error V

The Court erred in instructing the jury as set out verbatim, in said Specification of Error V, that if it should be found from the evidence that deceased had gone upon the property of plaintiff

in error eight or ten minutes before time to go to work, and was there waiting for the time to go to work, that deceased was engaged in a hazardous occupation under the Employers' Liability Law, and was rendering work, service and labor for defendant in error, regardless of the fact that he had not gone down into the mine to work.

We have in detail reviewed the unconflicting evidence and undisputed facts established thereby. The error of this instruction is now evident. The instruction does not meet or conform to these undisputed facts established, which are that deceased for a purpose of personal comfort, STEPPED ASIDE from the avenue of approach to his place of work, and OFF the same, some ten or fifteen feet, and thirty-five or forty feet from the rim of the quarry pit which was the work place, and two hundred feet distant from the work place of deceased, within such quarry pit, built a fire, all prior from fifteen to seven minutes to the time at which deceased would have actually gone to work had the accident not occurred to him. He never reached the place of work and never went to work. He built the fire alone, and in disregard of custom and against instructions generally given to workmen. The accident came from an explosion from some explosive CONCEALED by whom no one knows, and what the explosive was is not known. No connection between it and defendant in error exists in the evidence. All explosives were kept according to strict rules and rigid practice hereinbefore de-

tailed at length, in known depositories, and were never known to have existed or to have been present at the place of the accident or any like place, and had never been encountered save in the usual course of actual drilling and mining.

Upon such facts, such an accident can not even be said to arise out of or in the course of the occupation or employment, as we have seen from the authorities heretofore cited under a foregoing division of our argument, to which the attention of the Court is again respectfully directed.

However, the Supreme Court of Arizona has disposed of this particular instruction in the case of—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159, and also

Calumet & Ariz. M. Co. vs. Chambers, 20 Ariz. 54, 176 Pac. 839.

Ross vs. Kay Copper Co., 20 Ariz. 576, 184 Pac. 978.

Whereby, it appearing that an employee at the time of the accident IS ABSENT from his work, service and labor in his occupation or employment, he is not, and cannot be rendering work, service and labor therein, as erroneously stated in this instruction complained of, to the jury. Whether such absence comes by way of the employee not yet having reached the place of work and, therefore, not having entered upon the performance of his duties in such employment or occupation, or by way of

such employee having taken himself out of his work temporarily after having actually theretofore been engaged in his work, service or labor amounts to naught.

However hazardous the occupation might be, the deceased, in this case, was not engaged in it when he sustained the accident, and the error of the instruction complained of is obvious.

Specification of Error VI and VII.

The instructions contained in these two Specifications of Error are open to the same exceptions taken to that under foregoing Specification of Error V, and in giving the same, the trial Court worked the same errors as in said Specification of Error V.

Specification of Error VIII.

The Court erred in giving the two qualifying instructions in this Specification of Error contained, since such qualifications amount to and constitute a statement to the jury by way of instruction, that deceased was rendering work, service and labor for his employer by merely being upon the premises of the employer preparatory to going to work in his occupation a short interval of time before it was time to begin work, within the meaning of the said EMPLOYERS' LIABILITY LAW, and that therefore, an accident occurring to such employee so situated, is and was an accident due to a condition or conditions of the occupation or employment of such employee. This is manifest error

under the undisputed facts established by the uncontroverted evidence, and the aforementioned Mathews, Chambers and Kay Copper Company cases.

We think further, that the language in which the trial Court couched the qualifying instructions go a long way indeed, being to the effect that it is the **"opinion"** of the Court that such employee so waiting for the time to come to go to work upon the premises of the employer is so rendering work, service and labor in his occupation or employment, and ought not to be approved.

Careful examination of this language (transcript pp. 57, 58) results in a conclusion that the trial Court practically and in effect instructed the jury to return a verdict for defendant in error upon all the facts and circumstances that had been adduced before it.

Specification of Error IX.

The Court erred in refusing the instruction requested and contained in this Specification of Error, for reasons which by this time are apparent. It is uncontradicted that the deceased did light the fire, and that to do so was an act outside of his work, service and employment. He had not yet entered upon the performance of the duties of his occupation or employment when he went aside to light the fire. He was not in his work, service or employment at this time and under the Mathews, Chambers and Kay Copper Co. cases, plaintiff in

error was entitled to the instruction requested.

Specification of Error XII.

Upon the undisputed facts established by the uncontroverted evidence, the instruction requested and set out in this Specification of Error was proper. An utter absence of connection between plaintiff in error company and the explosive referred to in the requested instruction exists from the said evidence.

Specifications of Error XIII, XIV, XV and XVI.

Each and all of these Specifications of Error are covered by our foregoing argument made and therefore need not be argued in repetition. We direct our argument to each and all of them and submit that all and singular they are well taken.

In the consideration of the questions presented for determination in this cause, the Court must bear in mind, that in all the authorities that will or can be presented by defendant in error, NOT ONE can or will be laid before the Court involving or in which is or has been considered an enactment in industrial legislation, either of the nature of a compensation or liability act, containing the original, and further restrictive provision that the injury for which recovery or compensation is provided, MUST BE DUE TO A CONDITION OR CONDITIONS OF THE OCCUPATION OR EMPLOYMENT, superadded, in the conjunctive, which alone is found in the said EMPLOYERS' LIABILITY LAW of Arizona.

All authority that can or will be presented is upon and under and involves the aforementioned TYPE FORM enactment in industrial legislation, of which the Federal Employers' Liability Law is an instance, remedial solely and exclusively as to injury sustained ARISING OUT OF OR IN THE COURSE OF THE EMPLOYMENT OR OCCUPATION.

And, all such authority is inapplicable to the present enquiry, and not in point, in consequence. This, the Supreme Court of Arizona, in the Mathews case clearly recognizes and so states expressly in its opinion, which it arrived at unaided by all such authority or any of it, as we are in like manner impelled to do in this case.

To the authorities heretofore presented estab lishing that upon facts such as the facts hereinbefore detailed, this particular accident is even an accident NOT arising out of or in the course of the employment or occupation under the TYPE FORM enactment in industrial legislation, many decisions can be and will be offered in opposition, and out of them all, this will appear—that each such decision has been arrived at by or through some peculiar facts or attendant circumstances peculiar to it, wherein or whereby the absence or cessation of the employee from his actual performance of duty in the occupation or employment was in furtherance of the interest of his employer, or of some incident thereto, or that the accident came from risk or danger attendant upon or incident to such

employee at the time and place of its occurrence to such employee, and as to him in such situation existed as a likely or possible danger or risk.

Upon examination of this class of authority, we are satisfied to rest upon the proposition that the best of judicial expression and the soundest of enunciated principle sustains the mass of authority heretofore submitted in support of this division of our argument, by which we should and ought to be directed and guided in reaching our determination of the questions herein presented.

There is this further—defendant in error need not have made effort to recover under said EMPLOYERS' LIABILITY LAW, and therefore have assumed the burden of bringing the deceased within its provisions and its purview, even though thereby he might be able to step from under the other burden of establishing negligence in plaintiff in error company, which confronted him in the event he pursued the action for wrongful death (transcript pp. 4, 5, 6).

For,

> "Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The Common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. Secs. 4, 5, Art. 18. (2) Employers' liability law, which applies to hazard-

> ous occupations where the injury or death is not caused by his own negligence. Const. Sec. 7, Art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. Sec. 7, Art. 18."
> Smelting Company vs. Ujack, 15 Ariz. 382, 139 Pac. 465.

But, having determined to seek his recovery under said EMPLOYERS' LIABILITY LAW, he must bring himself within its purview and its provisions, and this he has wholly failed to do, as we have seen.

He had the right and opportunity to predicate the right of recovery upon the existence of negligence in plaintiff in error company as to the presence of the explosive substance at the place of the accident where deceased built his fire. And so, could have brought the usual action at common-law for the death of deceased. This, defendant in error elected NOT to do, but to pursue the remedy under said EMPLOYERS' LIABILITY LAW and thus he undertook to establish that the injury resulting in the death of deceased was caused by an accident with the other elements already discussed, due to a CONDITION OR CONDITIONS OF THE EMPLOYMENT OR OCCUPATION. Whether or not negligence exists in the employer, this element MUST EXIST. That it did not exist, we submit, we have conclusively shown.

The third possible remedy open in case of injury to an employee, The Compensation Act men-

tioned in the Ujack case, did not exist to this particular defendant in error, he being the administrator of the deceased employee.

Behringer vs. Mining Co., 17 Ariz. 232, 149 Pac. 1065.

Counsel desire to ask the indulgence of the Court for the detail and length of the foregoing presentation in argument, and submit in mitigation that the enactment under which the action is brought is a novel one in the several particulars hereinbefore discussed. Its validity has been sustained by a division in opinion of five to four in the highest tribunal in our land. Its application and construction is a thing of import by reason of its differentiation from all other known enactments in the field of industrial legislation, it being a departure from all such, hitherto unknown to jurisprudence, and therefore meriting the fullest consideration.

We have therefore endeavored to set before the Court the entire aspect of the present cause consequent upon an earnest endeavor to arrive at a sound solution of the questions presented, deeming the foregoing detailed argument upon the same necessary to that end.

And in conclusion we earnestly and respectfully submit that by reason of the patent errors of the trial Court hereinbefore in order set out and discussed in our argument, in accordance with our prayer for reversal (transcript p. 81), that the

judgment of the trial Court should and ought to be reversed, and its judgment ordered to be entered that this cause be dismissed.

RESPECTFULLY SUBMITTED,

.....

of Bisbee, Arizona.

.....

of Douglas, Arizona.

Attorneys for Plaintiff in Error, New Cornelia Copper Company, a Corporation

APPENDIX

Constitution—State of Arizona

ARTICLE XVIII.

Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an **Employers' Liability Law**, by the terms of which any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially

dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution .

EMPLOYERS' LIABILITY LAW

Revised Statutes Arizona, 1913

Chapter Six Title Fourteen

Sec. 3153. This chapter is and shall be declared to be an Employers' Liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such

employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 3155. The labor and services of workmen at manual and mechanical labor in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

Sec. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, etc.

* * * * * * * *

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

* * * * * * * *

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

Sec. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions inform

all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents, and if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the state constitution; provided, however, that in all actions brought against any employer,

under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Sec. 3161. In all actions for damages brought under the provisions of this chapter, if the plantiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 percent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

WORKMEN'S COMPENSATION ACT

Revised Statutes Arizona, 1913

Chapter Six, Title Fourteen, Sections 3164, 3169.

Sec. 3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof, (as provided in Sec. 8, of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any ac-

cident arising out of and in the course of, such employment, is caused in whole, or in part or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment.

Sec. 3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter.

NO. 3437

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Arizona.

MESSRS. KIBBEY, BENNETT & JENCKES,
of Phoenix, Arizona,
Attorneys for Defendant in Error.

Filed this ..... 1920.

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Clerk U. S. Circuit Court of Appeals,
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Service of two copies of within brief of Defendant in Error is hereby acknowledged this.....

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Attorneys for Plaintiff in Error.

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MAY IT PLEASE THE COURT:

The Arizona Employers' Liability Act is, as stated by counsel for plaintiff in error, *sui generis*. It was passed in obedience to the mandate of the State Constitution as contained in Section 7, Article XVIII., set forth *hec verba* on page 60 of plaintiff in error's brief. It will be noticed that the terms of the Act contain restrictive provisions not called for by the Constitution. The Act limits the liability to injuries caused "by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment." The Constitutional mandate enjoins the passage of a law by the terms of which the employer "shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation." The words "arising out of and in the course of such labor," etc., are not

required by the Constitutional mandate to be inserted in the Act, and if they vary or restrict the requirement of the mandate, must be disregarded. The Supreme Court of Arizona in the case of Behringer vs. Inspiration Con. Copper Co., 17 Ariz. 232 (at page 235), deciding the question of the power of the legislature to enlarge the requirements of the constitutional mandate, said:

> "Before looking to what the legislature did or attempted to do under this command, we should determine what it had the power to do. The command to it was to pass a law 'by which compulsory compensation shall be required to be paid to any such workman' for 'personal injury to any such workman,' leaving it optional with the workman (employe) 'to settle for such compensation or retain the right to sue said employer as provided by this constitution.' The legislature is limited by this constitutional mandate to providing for payment of compensation to the workman in case he should elect to accept it. * * * *
>
> "We do not think the legislature possessed the power to enlarge the mandate of the constitution so as to impose on his heirs and dependents a remedy made by the constitution open to the workman only."
>
> Behringer vs. Inspiration Con. Copper Co., 17 Ariz. 232 (at p. 235), 149 Pac. 1065.

And in Deyo vs. Arizona Grading and Construction Co., 18 Ariz. 149 (at p. 155), the Supreme Court, in construing the rule laid down by it in the Behringer case, as above quoted, said:

> "If it (the legislature) may not enlarge the mandate so as to bring within its provisions persons not mentioned by the constitution, it would seem, upon reason, that the legislature is without

power to exclude from the benefits of the constitutional provision persons therein designated as beneficiaries."

To be sure in Arizona Eastern vs. Matthews, 180 Pac. 159 (at p. 163) the Arizona Supreme Court modifies the effect of its decision in the Deyo case with respect to the power of the legislature in enacting a law giving effect to the requirements of a constitutional mandate to limit the persons entitled to the benefits of the Act, but such modification cannot alter the effect of that decision when applied to the question raised here. For the Court goes on to say, approving its former ruling in the Behringer case, supra, "the legislature may not extend the constitutional provision so as to include subjects not within its purview or that conflict with it."

Arizona Eastern R. Co. vs. Matthews, 180 Pac. 159.

In including in the Employers' Liability Act the words, "Arising out of and in the course of such labor, service and employment," if such words are to be given the effect contended for by defendant in error, the legislature certainly injected a subject not within the purview of the constitutional provision and in conflict with it.

However, we do not regard these words as greatly changing the effect of the constitutional requirement, if at all, in view of the restriction contained in such requirement, i. e., "in all cases in which the death or injury of such employe shall not have been caused by the negligence of the employe killed or injured," which do not appear in any of the compensation acts. In other words, we believe that the words "due to a condition" etc., coupled with those contained in the clause, "in all cases in which the death or injury of such employe shall not have been caused by the negligence of

the employe killed or injured'' will produce the same results when construed in connection with industrial injuries as have been reached by the construction of the words ''arising out of and in the course of,'' etc. To make our meaning clearer we will designate these three phrases or clauses in the order in which they appear in the Arizona Employers' Liability Act, respectively, clauses ''A'', ''B'' and ''C''. The various compensation acts contain clause ''A'' only. Clause ''C'', with its salutary provision limiting the recovery to injuries not caused by the negligence of the employe killed or injured, is absent. But the courts and industrial commissions have been loath to allow compensation in cases where the injuries have been caused by the negligence of the injured persons, and so in considering, under compensation acts, cases of injuries produced by such negligence, even where strictly speaking they must have fallen into the category of accidents arising out of and in the course of the employment, it has been deemed expedient to put a forced construction upon the words and hold that such injuries did not so arise. This is aptly illustrated by the decision of the House of Lords in the British case of Plumb vs. Cobden Flour Mills Co., reported in 7 British Workmen's Compensation Cases at page 1, and also in 7 British Ruling Cases at page 128. In that case the workman Plumb was employed in stacking bundles of sacks. The work was ordinarily done by hand, but after the stack had reached the height of seven feet it was no longer possible to throw the sacks to the top of it. Plumb conceived the plan of raising them by means of a revolving shaft which ran along the ceiling for the purpose of transmitting power to another room. Being on top of the stack he passed a rope around the shaft, attached one end to a bundle, which was drawn up by the revolving shaft when tension was put upon the other end of the

rope. Plumb's arm became entangled in the rope and he was pulled over the shafting and injured. Generally speaking this would be classed as an accident which arose out of and in the course of his employment, but because the peril encountered was an added one caused by the conduct (misconduct, if you please), of the employe Plumb it was held that the accident did not so arise.

The necessity for arriving at such a conclusion has resulted in various definitions being given to the term embraced in clause "A". Thus we have the definition given by the Supreme Court of New Jersey in the case of Bryant vs. Fissel, reported in the 86 Atl. Rep. 458 (pp. 460-461): "For an accident to arise out of and in the course of the employment it must result from a risk *reasonably* incidental to the employment. * * * An accident arises in the course of the employment if it occurs while the employe is doing what a man so employed may *reasonably* do within a time during which he is employed and at a place where he may *reasonably* be during that time. * * * An accident arises out of the employment when it is something the risk of which might have been contemplated by a *reasonable* person when entering the employment as incidental to it."

And in Plumb vs. Cobden Flour Mills Co., supra, in referring to the decision in Craske vs. Wigan, 2 K. B. 635, Lord Dunedin says: "I think the point is very accurately expressed by the Master of the Rolls, * * * where he says: 'It is not enough for the applicant to say, "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further and must say, "The accident arose because of something I was doing in the course of my employment or

because I was exposed by the nature of my employment to some peculiar danger.'' ' ''

We have as yet had no adequate judicial definition of the term embodied in clause ''B''. Defendant in error places considerable reliance for such definition upon the decision in the case of Arizona Eastern R. Co. vs. Matthews, supra. But we are unable to gather anything from that case except the determination by the court that the particular accident causing Matthews' injury was not due to a condition or conditions of his employment because (1) the danger of falling into the scale pit was not peculiar to him in his occupation of bill clerk, and (2) because he was not engaged in a hazardous occupation within the statute.

As stated in the Matthews case, the words ''arising out of'' have been construed to refer to the origin or cause of the injury, and the words ''in the course of'' to refer to the time, place and circumstances under which it occurred. The conditions of any employment must be the circumstances surrounding the work incident thereto, including those of time and place, and any accident which is due to such conditions must necessarily be engendered thereby, or, in other words, arise therefrom. So we cannot distinguish any essential difference between the terms embodied in clauses ''A'' and ''B''. And the soundness of this reasoning seems to be supported by the action of the Arizona constitutional convention in purposely ignoring clause ''A'' in promulgating the constitutional mandate relating to the Employers' Liability Act and embodying therein the entirely new term represented by clause ''B'' coupled with the restriction as to negligence embodied in clause ''C''. The convention no doubt had before it the numerous compensation acts when considering this provision of the constitution and realizing the difficulty which would be encountered in attempting to reconcile

the many conflicting decisions thereunder, and desiring to avoid the confusion which must arise in construing the new law in the light of such decisions, changed the wording to that embodied in clause "B", thus eliminating the outward form, but retaining the essence; and then in order to render unnecessary any such strained construction as had been placed upon the provisions of the compensation acts they added clause "C", thus forming the basis for the enactment of a law very simple, comprehensive and easy of application. Had the legislature not complicated the situation by including the words of clause "A", we believe the practical application of the law would have been greatly simplified.

Our purpose in thus attempting an analysis of the Act is to make clear to Your Honors our view that it is not necessary to a just determination of this case to try and reconcile its facts and circumstances with those presented by the numerous compensation cases, and to attempt to determine therefrom whether or not the accident which caused the death of defendant in error's intestate arose out of and in the course of his occupation and employment. The cases are numerous. The propositions of law advanced by plaintiff in error are supported by many of them. But we do not believe that those so advanced are applicable to the case at bar under a proper construction of the Arizona Employers' Liability Act.

In the first place we do not agree with counsel concerning the conclusions to be drawn from the evidence as disclosed by the record. To specify:

(1.) That no recovery can be had because deceased "stepped aside" to build the fire.

(2.) That deceased was not at the time of the accident in the employ of plaintiff in error.

(3.) That deceased built the fire in disobedience of instructions.

(4.) That because the danger from explosives was one threatening anyone who might come upon the premises, it was not one inherent in deceased's occupation.

(5.) That there is no showing that deceased was injured by an explosion of powder.

(6.) That no one ever had knowledge of any instance where any unused portion of explosive had not been returned to the powder house.

There is ample authority to sustain the instruction of the trial court that deceased had entered upon the employment when he reached the employers' premises even though he arrived a few minutes before the time to commence work. See the cases noted in Bradbury's Workmen's Compensation Law, 2nd Edition, Vol 1. p. 419 et seq. Also see City of Milwaukee vs. Althoff, 145 N. W. 238, 4 Neg. & Com. Cases An. 110, and cases therein cited in the annotation thereto, including Brice vs. Edw. Lloyd, Ltd., 2 B. W. C. C. 26. Gane vs. Norton Hill Colliery Co., 2 B. W. C. C. 42.

That there is ample evidence to sustain the finding of the jury that the accident arose out of and in the course of such hazardous employment and was due to a condition or conditions of such employment is also apparent from the record. The thing which deceased was doing "in the course of the employment" was holding himself in readiness to go down into the pit when the other shift came out. He was not following a direct "path" to the pit as counsel would have it, but he and his fellow workmen were congregated practically at the point of entry into the pit, within thirty feet thereof. Must they huddle together like sheep or like men in a chain gang rooted to one spot? Are they not allowed

some latitude of movement while thus waiting? We do not think it can be said that the deceased "stepped aside" to build the fire. The act was not the same as if he and his companions were following the path to immediately enter the pit. In such event the act might properly be characterized as a "stepping aside", or an abandonment or interruption of the employment. But here the "course of the employment" was not broken by the deceased. He was still holding himself in readiness. The act he was performing had no more relation to the employment than if he had sat or lain down to rest. What he was doing in the course of his employment was holding himself in readiness subject to the company's orders. So long as he was not doing a prohibited or otherwise negligent act, it ought not to be a bar to recovery. Many cases cited in Bradbury, supra, detail instances of the performance by employes of personal acts during which injuries occurred, for which compensation was allowed. We do not think it can be seriously contended that deceased was violating any rule of the company or doing a prohibited act when he lit the fire. The testimony of the witness Charles W. McHenry was that the defendant company "has no particular rule about lighting fires." (Transcript p. 45).

That deceased's occupation was a hazardous one, and that injury from explosions was a danger inherent in his occupation we think is also apparent from the evidence. The reasoning deduced by plaintiff in error from the decision in the case of Arizona Eastern R. Co. vs. Matthews, supra, cannot be applicable to the facts here. In that case Matthews was not engaged at any time in a hazardous employment and so the danger with which he was threatened was not inherent in his occupation. Therefore it was common to him and all other people in the same situation. He encountered it at his peril subject only to the condition that injury to him

therefrom must not be produced by the negligence of others. And as he sued under the Employers' Liability Act where negligenec of his employer had no place, he could not recover. But such was not the case here. The danger was inherent in the deceased's occupation and bore a distinct relation to him which it could not bear to others outside of the occupation who might come upon the premises.

The plaintiff in error company was engaged in extensive mining operations, using therein large quantities of explosives. No doubt as contended by counsel for plaintiff in error rules were adopted which were intended to prevent accidents from unintended explosions. The men were instructed to return to the powder house when going off shift such surplus powder as had not been used. But it is well known that men become careless and that rules are not always observed. It speaks well for the management that more accidents had not happened at the time of deceased's injury. It is because of likelihood of such accidents where large quantities of explosives are in use that all work necessitating dangerous proximity thereto was declared to be hazardous by the Act. That in order to bring himself within its protection a workman must have been actually handling and working with the explosive at the time would be to destroy and nullify its purpase. In many cases of injury from explosives the workman is not aware of its presence. An unexploded charge is unexpectedly encountered or a stick may have been left lying about by another workman unknown to him. Of course in the instant case it cannot be said with certainty how the explosive which caused deceased's injury happened to be at the particular spot where the accident occurred. But that there was ample opportunity therefor under all the facts and circumstances as disclosed by the evidence, there can be no doupt. The witness McHenry,

plaintiff in error's mine foreman, after detailing the practice prescribed for the handling of the explosives, said, "There are times when men have powder left over; unless the men return the powder left over to the powder house, I do not know what they might do; it is possible that some powder left over might not be returned to the powder house; it is done." (Transcript p. 47). This was one of the "conditions of the occupation" in which the deceased was engaged—working for a mining company using large quantities of explosives entrusted to fellow employes who did not always return the surplus powder so entrusted to their care to the powder house when going off shift. It is not for the defendant in error to prove how the powder came to be where it was when the accident happened. It is only for him to show the "conditions of his occupation" and that by reason of such conditions and the nature of his occupation in relation thereto he was exposed to the peculiar danger declared by the Act to be inherent in such occupation. Possibly the powder was not purposely placed where it was when it exploded—perhaps it was accidentally dropped there—but that it was powder and of the kind used by the plaintiff in error company we think the evidence sufficiently shows. That it did explode and kill the deceased is beyond question. The witness Delgado testified: "There was some powder under some wood and the deceased didn't know that there was any powder there and lit some papers there. The powder was under the fire. * * * I used powder in working in the mine * * * The powder used by the men belonged to the New Cornelia Copper Company." (Transcript p. 41).

And to sum up let us see if the facts and circumstances disclosed by the evidence bring the deceased within the rules laid down in Bryant vs. Fissel, Craske vs. Wigan, and Plumb vs. Cobden Flour Mills Co., supra.

First. Did his injury result from a risk reasonably incidental to the employment? We think we have shown this to be the case from the conditions under which the powder was used and handled. And further that such a risk is reasonably incidental to any employment where explosives are used.

Second. Did the injury occur while the deceased was doing what a man employed as he was might reasonably do at the time, and while he was at a place where he might reasonably be during that time? The jury has answered this question in the affirmative under instructions given by the trial court bearing upon the question of deceased's negligence, and there being evidence sufficient to support such finding we do not believe it should be disturbed.

Third. Was the risk of the accident met with by deceased one which might have been contemplated by a reasonable person when entering the employment as incidental to it? What could be more in contemplation by any reasonable person entering an employment where explosives were used as extensively as the evidence shows them to have been used in this case than that such an accident might be met with as incidental to the employment?

Fourth. Can it be said of the deceased that the accident arose because he was exposed by the nature of his employment to some peculiar danger? This we think must also be answered in the affirmative. The nature of his employment being such as to require the use of and proximity to explosives the peculiarity of the danger incident thereto appear to be plain.

And finally was the accident by which the deceased met his death due to a "condition or conditions of his

occupation''? We think the answers to the four preceding queries are sufficient to determine this question, but to express our idea of the situation more succinctly, we will answer this question by propounding another one. What could be more peculiarly a condition of the occupation of one employed in and about a mine where large quantities of explosives are used than that he at all times while engaged in such occupation incurs the risk of being injured by an accidental explosion? Consequently if such explosion does occur it must necessarily follow that the accident was ''due to'' such condition. The employment being once established, carries with it all the conditions incident thereto. The employer can escape liability only when the accident is caused by the negligence of the injured person. It is not sufficient for such purpose that the injured person's act set in motion the chain of events which produced the injury; it must have been his *negligent* act. The negligence, not the act, must have been the proximate cause of the injury.

We submit that a careful review and consideration of all the facts and circumstances surrounding the death of the defendant in error's intestate, Jose Maria Ochoa, as disclosed by the transcript of the record in this case, bearing in mind that all the witnesses who testified, except the widow of the deceased, were, both at the time of the accident and at the time of the trial in the employ of the plaintiff in error company and naturally reluctant to testify to anything that would be detrimental to their employer's interests, will disclose a case peculiarly within the Arizona Employers' Liability Act and one which that Act was intended to cover. We are not concerned with the question of the constitutionality of the Act or the liability of the plaintiff in error for the injury without its fault; those matters have been disposed of by the Supreme Court of the United States. Suffice it to say

that the liability is not unlimited or left to the caprice of the jury—it must in all cases be a just compensation for the injury sustained and is subject to the regulation of the courts.

Respectfully submitted,

Kibbey Bennett & Jenckes

Of Phoenix, Arizona, Attorneys for
Defendant in Error.